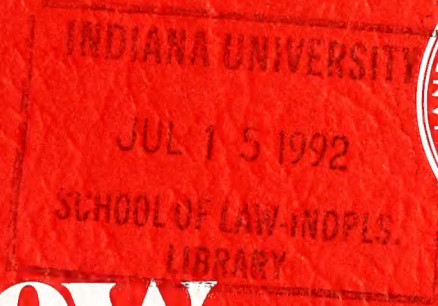


Indiana Law Review



Volume 25 No. 4 1992

1991 Survey of Recent Developments in Indiana Law

Special 25th Anniversary Edition

Our Bill of Rights

The Honorable Justice Lewis F. Powell, Jr.

**Indiana Law and the Idea
of Progress**

The Honorable Chief Justice Randall T. Shepard

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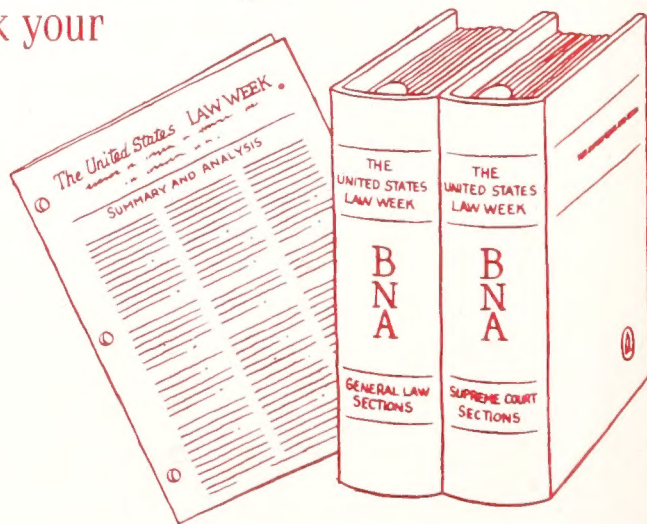
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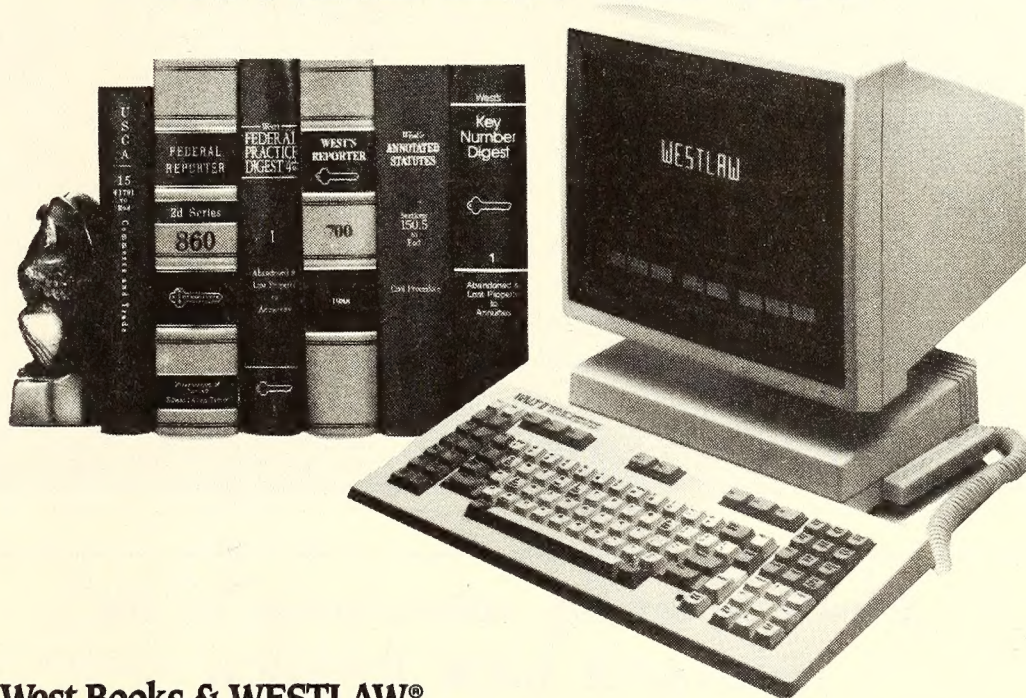


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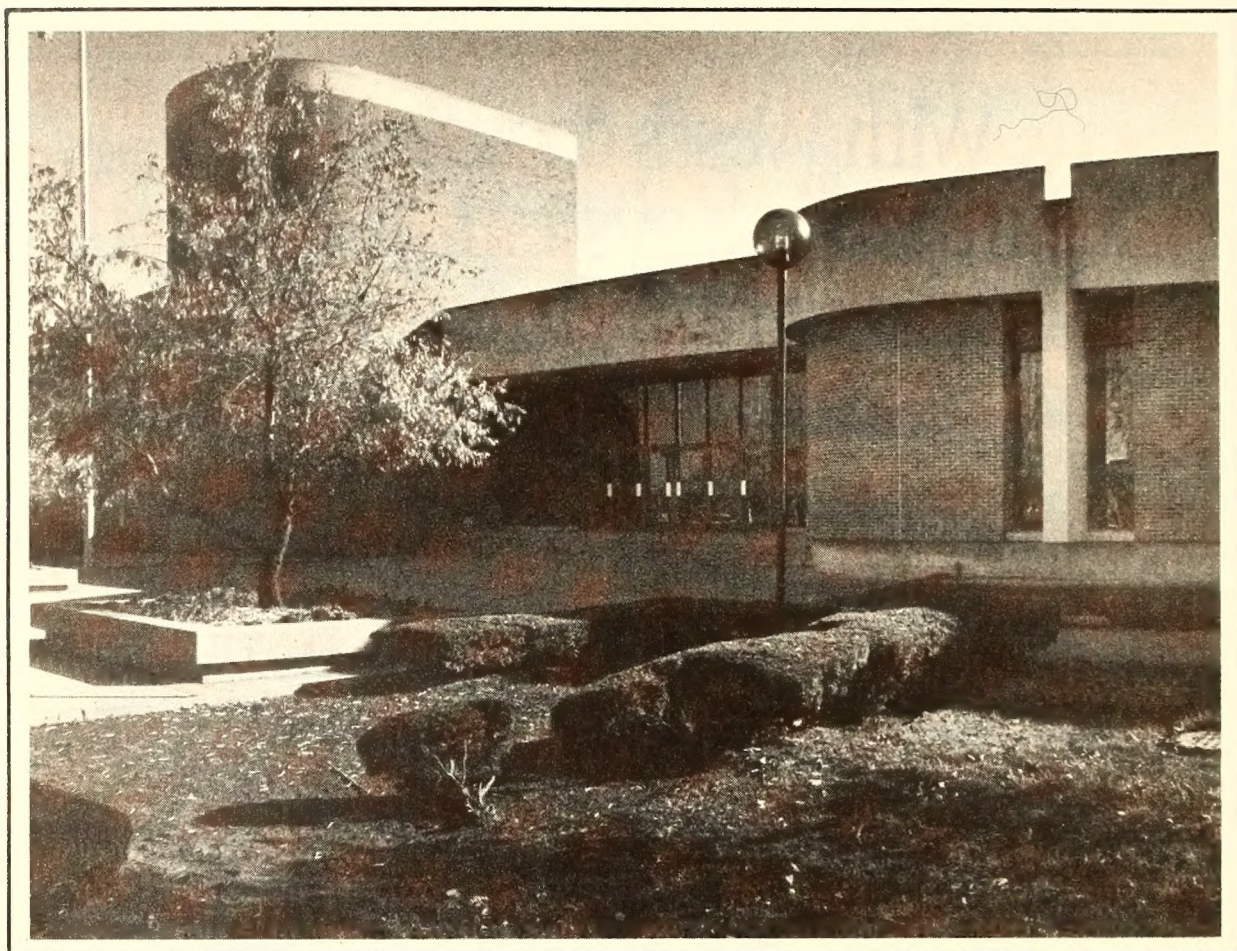
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** On leave at Tenri University, Nara, Japan, 1991-92.

Editors Note

This year marks the 25th anniversary of the *Indiana Law Review*, and in celebration of this event, the editors of the *Review* present this special anniversary issue of the *Survey of Recent Developments in Indiana Law*. In addition to the annual in-depth analysis of changes in Indiana law, it is fitting that this anniversary issue also contains two historical retrospectives examining the evolution of both federal and Indiana jurisprudence.

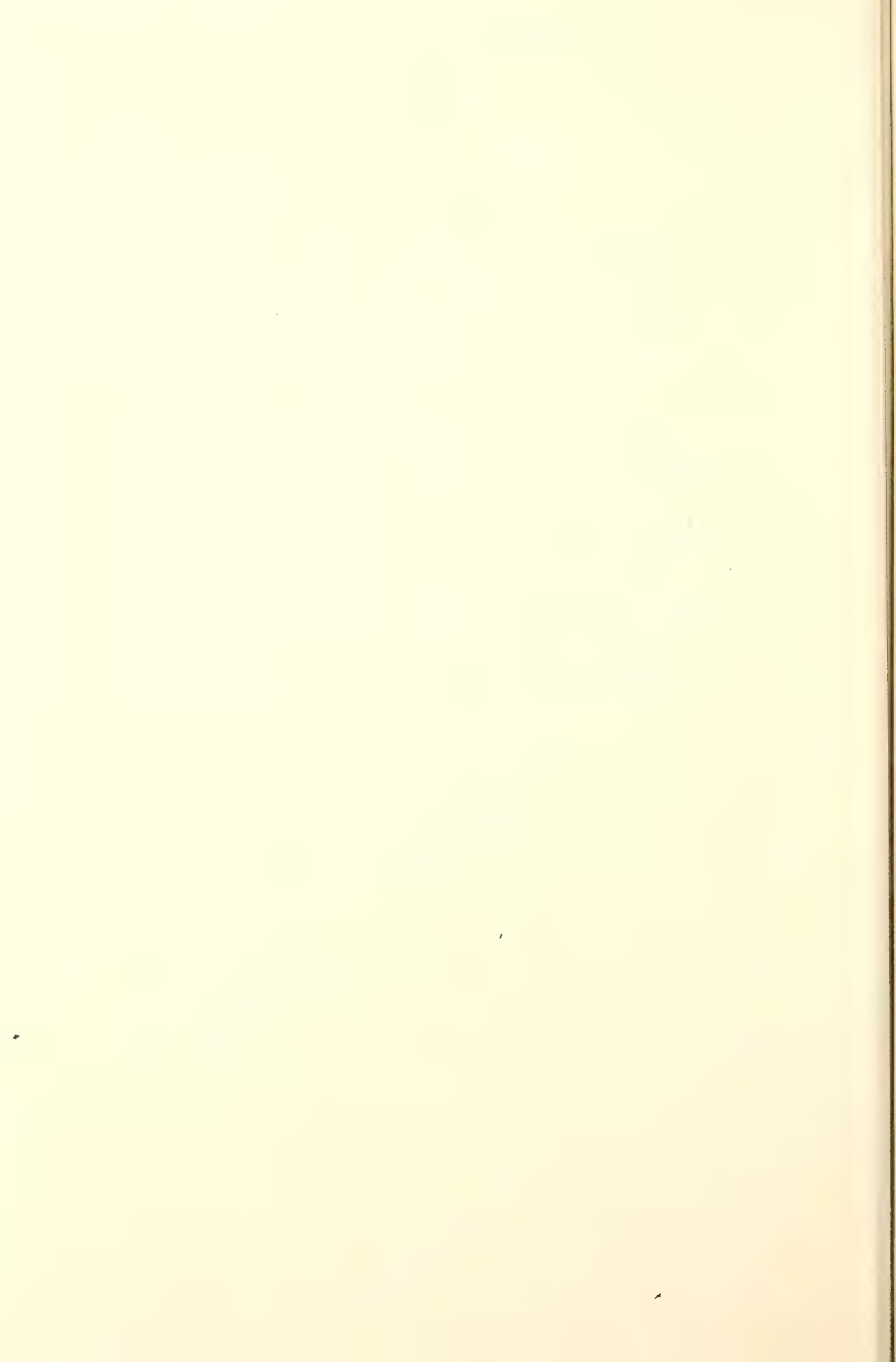
First, we are honored to publish a speech written by the Honorable Lewis F. Powell, Jr., Associate Justice of the United States Supreme Court (retired). The speech was delivered at the American Bar Association conference held in Williamsburg, Virginia on December 17, 1991 to commemorate the 200th anniversary of the Bill of Rights. In his remarks, Justice Powell eloquently traces the development of the Bill of Rights and reminds us that "it might have been otherwise."

Also, we are very pleased that the Honorable Randall T. Shepard, Chief Justice of the Indiana Supreme Court, accepted our invitation to write the foreword to this year's Survey Issue. Chief Justice Shepard provides an insightful historical analysis of Indiana law during two periods (from statehood through the nineteenth century and from World War I to the present), highlighting the progressive nature of Indiana's legal evolution.

This year's *Survey of Recent Developments in Indiana Law* also includes articles written by faculty members of the Indiana University School of Law—Indianapolis, Indiana University School of Law—Bloomington, Valparaiso University School of Law, and the University of Notre Dame School of Law, as well as articles written by several distinguished practitioners. We trust that you will find their articles engaging, informative, and helpful.

As the Board of Editors completes this silver anniversary issue, we do so with the hope that during the next twenty-five years of its history, the *Indiana Law Review* will continue to make a significant contribution both to the development of Indiana law and to the critical and creative dialogue concerning law generally. By providing a forum for debate on current legal issues, we hope the *Review* will continue to play a vital role in legal discourse into the 21st century.

Jan S. Blaising
Executive Articles Editor
Indiana Law Review



Indiana Law Review

Volume 25

1992

Number 4

Our Bill of Rights

LEWIS F. POWELL, JR.

Associate Justice (retired)

Supreme Court of the United States*

Thank you, President Sandy D'Alemberte, for inviting me to address the ABA Bill of Rights Conference. The Conference draws together several of my interests — the ABA, Colonial Williamsburg, and of course the Bill of Rights. I thus am happy to take part in your celebration.

The topic assigned to me is: "If I Were Writing the Bill of Rights Today." At the outset let me note that, in accepting this invitation, I did not assume the task of rewriting the Great Bill. I am quite satisfied with the one we have: It is one of the great documents of western civilization. Furthermore, I did not retire from active service on the Court, where I was asked "merely" to interpret the Bill of Rights, to take on the task of rewriting it.

In speaking to this subject, then, I will discuss several developments during the last 200 years that a *hypothetical* drafter of a "modern" Bill might wish to consider.

Chief Justice John Marshall, in *Marbury v. Madison*,¹ laid the groundwork for broad application of the Bill of Rights. Judicial review — the power to determine the constitutionality of legislative acts — permits a life-tenured federal judiciary to operate as a bulwark against democratic excesses. It also has permitted the judiciary, though lacking the power of purse or sword, to play an essential role in our tri-partite system of checks and balances.

A second important development has been the application of the Bill of Rights to the states. Today it is easy to forget that the Bill originally operated as a check only on the federal government. It might have been otherwise.

* Remarks given at the ABA Bill of Rights Conference, Williamsburg, Virginia, December 17, 1991.

1. 1 Cranch 137 (1803).

You may remember that James Madison, in drafting the original amendments, proposed several restrictions on the states. These were defeated. States' rights, not those of the individual, dominated the Constitutional debates. The states jealously guarded local prerogatives, seeking to prevent what were perceived to be efforts to aggrandize federal authority. Individual liberties, it also was thought, would be protected by preserving the sovereignty of the states.

At another period early in our Nation's history, the Bill might have been applied to the states. In 1833, the Supreme Court considered whether the "takings clause" of the Fifth Amendment applied to the states. In *Barron v. Baltimore*,² the Court concluded that the Bill restricted the federal government, not the states. Chief Justice Marshall wrote for the Court: "These amendments demanded security against the apprehended encroachments of the general government — not against those of the local governments."³

Experience, to be sure, demonstrated that the states were not immune from abridging individual rights. The threat of "overbearing majorities," to use Madison's expression, manifested itself equally at the local and federal level. In spite of this experience, application of the first eight amendments to the states did not occur until after the ratification of the Fourteenth Amendment in 1868.

By the end of the nineteenth century, the Supreme Court had applied certain property rights provisions to the states. Not until the 1920s, however, did the Court apply to the states what we think of as the primary civil liberties contained in the Bill. In 1925 the Court observed in *Gitlow v. New York*,⁴ that First Amendment freedoms "are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."⁵

Additional time was required for the Court to decide what rights in the Bill were "fundamental." In 1937, Justice Cardozo wrote in *Palko v. Connecticut*,⁶ that some "immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states."⁷

2. 32 U.S. 243 (1833).

3. *Id.* at 250.

4. 268 U.S. 652 (1925).

5. *Id.* at 666.

6. 302 U.S. 319 (1937).

7. *Id.* at 324-25.

By 1947, Justice Black took the view that each of the first eight amendments was absorbed into the Fourteenth Amendment. In his dissent in *Adamson v. California*,⁸ he observed that the Bill of Rights was designed to restrain “the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many.”⁹ Justice Black concluded that the Court should adhere to what he “believe[d] was the original purpose of the 14th Amendment — to extend to all the people of the nation the complete protection of the Bill of Rights.”¹⁰

This broadly-stated view did not gain the support of a Court majority. By the later years of the Warren Court, however, the result that Justice Black favored had largely been achieved: namely, the principal free thought and criminal procedure protections had been made applicable to the states. Today, these provisions curb the authority of presidents and governors, Congress and state legislatures, and federal and state judges.

A further development of interest has been the content that the Supreme Court has read into several of the amendments. The fear that the amendments would prove to be little more than “parchment barriers” was realized during much of the nineteenth century. Not until after World War I were the liberty interests inherent in the Bill of Rights fully recognized.

Consider for instance the transformation of perhaps the most important freedom protected by the Bill of Rights: the right to think and speak freely. I emphasize this provision because, in a system like ours in which citizens are sovereign, only an *informed* public can be trusted to make democracy work.

The promises of freedom of speech and thought that the First Amendment provides — and that Madison envisioned — were not entirely fulfilled for many years. As recently as 1919, the Supreme Court upheld federal convictions of Socialist Party members who protested conscription.¹¹ Punishment of political protests of this sort seems improbable today. Contrast, for instance, what the First Amendment permitted the government to punish during the World War I era and what it required the government to tolerate during the post-Vietnam War era. The difference is telling. It provides one measure of the increasing rigor with which the free speech guarantee has been enforced.

8. 332 U.S. 46 (1947).

9. *Id.* at 89 (Black, J., dissenting).

10. *Id.*

11. See *Schenck v. United States*, 249 U.S. 47 (1919). See also *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919).

Other guarantees in the Bill of Rights have undergone similar transformations. For example, the Fourth Amendment protection from unreasonable searches and seizures was fortified by the Court's decision in *Mapp v. Ohio*,¹² making the exclusionary rule applicable to state as well as federal authorities. The Fifth Amendment protection from self-incrimination was strengthened by the Court's decision in *Miranda v. Arizona*.¹³ And the Sixth Amendment right to counsel was fortified by *Gideon v. Wainwright*,¹⁴ which guaranteed indigents the right to counsel in state felony prosecutions.

Another development of great importance has been the application of these guarantees to minorities. Later constitutional amendments, though not part of the Bill of Rights, provided further protections to individual liberties.

I am thinking of the Civil War amendments, particularly the equal protection clause, and the nineteenth amendment, guaranteeing women the right to vote. Landmark Supreme Court decisions gave them effect. *Brown v. Board of Education*,¹⁵ for instance, declared that "[s]eparate educational facilities are inherently unequal."¹⁶ And *Baker v. Carr*¹⁷ and *Reynolds v. Sims*,¹⁸ together established the principle of one person, one vote.

Other provisions of the Constitution, it bears note, also have protected civil liberties. The text of the original Constitution prevents religious tests for public office, bars the suspension of habeas corpus, prohibits *ex post facto* laws and Bills of Attainder, and establishes a two-witness requirement for treason prosecutions. The structure of limited government that the Constitution imposes further protects freedom by dispersing power (i) between the state and national governments and (ii) among the three branches of federal authority.

Nor does the federal Constitution stand alone in protecting individual rights. The constitution of the fifty states may provide different — and sometimes more far-reaching — protections from the federal Constitution. For example, some state supreme courts, responding to restrictive interpretations of certain guarantees by the Supreme Court of the United States, recently have construed similar guarantees in their own constitutions more broadly. Federalism, in this context, can be a two-way street. Though the Constitution sets a national floor, the states may

12. 367 U.S. 643 (1961).

13. 384 U.S. 436 (1966).

14. 372 U.S. 335 (1963).

15. 347 U.S. 483 (1954).

16. *Id.* at 495.

17. 369 U.S. 186 (1962).

18. 377 U.S. 533 (1964).

extend protections further, giving their citizens protections not afforded by the federal charter.

One listening to what I have said so far might assume that some of these developments indicate flaws in the original Bill of Rights. That is not my point. While the changes were important ones, it is doubtful that any of them could have been included in the original Bill — either because the need for them was unforeseeable, or because inclusion of them was not politically feasible. What Justice Cardozo once said of Magna Carta may largely be true of the Bill of Rights: “[W]hat lives in the Charter today is the myth that has gathered around it — the things that it has come to stand for in the thought of successive generations — not the pristine core within, but the incrustations that have formed without.”¹⁹

The Bill of Rights was written in a way that permitted the evolution I have highlighted.²⁰ In drafting the Bill, Madison relied principally on Virginia’s Declaration of Rights. The Virginia Declaration, written by George Mason, itself invoked the language of earlier charters, such as the English Bill of Rights of 1689 and the Magna Carta, which was written in 1215. Drawing on these historic documents, Madison drafted broadly-worded, forward-looking guarantees — guarantees that could be applied to other generations, experiencing variations of age-old conflicts between majority and minority, between security and liberty. As such, the Bill of Rights became more than a symbol of American freedom; it became a powerful instrument in achieving and preserving it.

* * * * *

In concluding, let me say that I know of no better form of government than our own. One of the principal reasons for its success, in my view, is the presence of the first ten amendments. They have constrained, in a way that no other declaration of human rights has, the excesses of zealous majorities and over-eager government officials.

And yet they have allowed us to retain a commitment both to individual freedom on the one hand, and the supremacy of law on the other.

It has been appropriate to have this Conference in Williamsburg, Virginia.

19. *Selected Legal Writings of Benjamin Nathan Cardozo* 104 (1947).

20. The Bill of Rights was ratified on December 16, 1791, when Virginia became the eleventh state to approve the amendments.

Indiana Law and the Idea of Progress

RANDALL T. SHEPARD*

The annual Survey Issue of the Indiana Law Review intends to assess the ways Indiana law has moved during the year. Authors with special talent provide their assessments of our progress in various fields. By way of a foreword to their work, I address here the general idea of movement in Indiana law. It seems clear to me that Indiana's lawmakers and Indiana's legal profession have been and are far more progressive than we give ourselves credit for.

The practice of labeling Indiana as a place slow to accept new ideas may well run back to a time even before the 1923 publication of Irvin S. Cobb's pocket book whose title said a great deal, *Indiana: Intellectually She Rolls Her Own*.¹ Neal Peirce demonstrated that this practice is alive today in the national press when he wrote, "Hoosiers take perverse pride in letting someone else be first."² Closer to home, even some whose careers advanced by benefit of Indiana choose to bash the state. A new United States Trustee recently described the Southern District of Indiana as a "backwater," as though he had just been assigned to a post in Siberia.³ Indeed, even the pages of the *Indiana Law Review*'s annual Survey Issue have sometimes featured hometown criticism of the state's legal system as backwards. One of the state's well-known products liability litigators wrote in the 1984 edition, "Indiana has taken giant strides backwards in time"⁴

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1. Cobb's description of the state's intellectual independence went like this: She is not content to borrow the makings of such intellectual standards and such literary ideals as she has — and they are high ones — from the spaghetti-fed Infant Prodigies of Greenwich Village and Sheridan Square in New York, nor yet from the Russo-Slavonic-Germaniacal School of Chicago, with its air of infallibility and its garlicky breath. She rolls her own!

IRVIN S. COBB, *INDIANA: INTELLECTUALLY SHE ROLLS HER OWN* 43-44 (1923).

2. NEAL PEIRCE & JERRY HAGSTROM, *THE BOOK OF AMERICA: INSIDE FIFTY STATES TODAY* 282 (1983).

3. Richard Cady, *Five Bankruptcy Trustees to be Replaced*, *INDIANAPOLIS STAR*, Dec. 16, 1987, at B6.

4. John Vargo, *Survey of Recent Developments in Indiana Law: Torts*, 17 *IND. L. REV.* 341, 385 (1984) ("Excellent examples of the 'frigid waters' of Indiana legal policy can be found in the major areas of litigation in tort law.").

Other examples of such sentiment abound.⁵

Running contrary to this chorus of criticism is the considerable evidence of Indiana's willingness to grasp new ideas. In writing the opinion for our court in *In re Lawrance*,⁶ I was struck by the fact that the Indiana General Assembly was the first legislature in the nation to adopt the Uniform Health Care Consent Act devised by the Commissioners on Uniform State Laws.⁷ Using that statute and other Indiana legislative and constitutional authority, our court answered questions about the right to refuse life-sustaining medical treatment which had not yet been addressed by any supreme court in the country.⁸ Progressive legislation and ground-breaking judicial action have actually been part of Indiana's history for a long time. Throughout the nineteenth century and during the progressive era of this century, Indiana built a decent record of addressing new social problems through legislation and litigation. The year 1991 demonstrated that this is a

5. Walter W. Krieger, Jr. & Michael A. Shurn, *Landlord-Tenant Law: Indiana at the Crossroads*, 10 IND. L. REV. 591, 643 (1977) ("Indiana is truly at the crossroads of landlord-tenant reform — and is wavering."); Harold Greenberg, *Vertical Privity and Damages for Breach of Implied Warranty Under the U.C.C.: It's Time for Indiana to Abandon the Citadel*, 21 IND. L. REV. 23, 31 (1988) ("Despite the continuing assault on and collapse of the citadel elsewhere, the assault in Indiana has proceeded extremely slowly. . . ."); Nancy L. Marshall, Note, *The Constitutional infirmities of Indiana's Habitual Offender Statute*, 13 IND. L. REV. 597, 626 (1980) ("Old attitudes die hard. Consequently, Indiana courts have rather consistently upheld the habitual offender statute . . . with little or no enlightened reasoning."). This last image of Indiana as a place where citadels are protected puts us in company with Alabama. "Few parapets of the citadel of privity have been more stoutly defended than that portion of the fort assigned to the protection of the Alabama judiciary." Julian B. McDonnell, *The New Privity Puzzle: Products Liability Under Alabama's Uniform Commercial Code*, 22 ALA. L. REV. 455, 455 (1970). On the other hand, steadfastness sometimes leads to praise. *United States v. Stump Home Specialties*, 905 F.2d 1117, 1120 (7th Cir. 1990) ("Freedom of contract is alive and well, and it is living in Indiana.").

6. 579 N.E.2d 32 (1991).

7. IND. CODE §§ 16-8-12-1 to -13 (1988 & Supp. 1991).

8. The New York Times told its readers that the case "could provide legal guidance on some of the thorniest issues of medicine and law, issues left open by the United States Supreme Court's decision last year in the case of Nancy Cruzan." Tamar Levin, *Despite Daughter's Death, Parents Pursue Right-to-Die Case*, N.Y. TIMES, July 28, 1991, at 10, col. 2 (also observing that questions of first impression facing our court included what to do when a person in a persistent vegetative state has not left instructions or was never competent to indicate her preference about prolonged life support). Commenting on our resolution of the case, the editors of *USA Today* wrote, "Indiana's Supreme Court ruled Monday that life-or-death decisions are too important to be left to strangers. . . . [T]he Indiana decision moved us in the right direction." *Life-and-Death Decisions*, USA TODAY, Sept. 17, 1991, at 10A.

state still committed to searching for the best solutions to the legal problems of modern society. I begin by discussing the history of Indiana's more progressive moments and close by outlining the many ways in which Indiana today builds on that history.

I. PROGRESS AND THE FIRST INDIANA CENTURY

I have chosen four landmarks representing Indiana's legal progress from the time of statehood to World War I. First, the Indiana Supreme Court spent forty years fighting slavery. Second, we were among the first states to hold that an indigent defendant is entitled to counsel at public expense. Third, Indiana courts admitted women to the bar through court rule when other states would not. Fourth, Indiana was among the first states to adopt a rule excluding illegally seized evidence.

A. *The Fight Against Slavery*

The central social issue of the era in which Indiana became a state was undoubtedly slavery. Those who wrote the Indiana Constitution of 1816 chose to include a strong prohibition: "There shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of crimes. . . . Nor shall any indenture of any negro . . . hereafter made, and executed out of the bounds of this state be of any validity within the state."⁹ The Indiana Supreme Court also staked out a strong position in the fight against slavery.

While the state government was still situated in Corydon, the supreme court of the new state was put to the test. It would have been easy enough for the Indiana Supreme Court to grant relief to the slaveowner who appeared before it asking the return of his slave, a woman known only as Polly. Polly was the daughter of a slave whom Lasselle had purchased from the Indians in the territory northwest of the Ohio River before Virginia ceded it to the United States government and before Indiana entered the Union. The Circuit Court of Knox County remanded Polly to the custody of Lasselle saying, "[F]or as far as it regards the situation of the mother of the present applicant, this is now a slave state."¹⁰ Polly appealed. In *State v. Lasselle*,¹¹ the Indiana Supreme Court set her free, observing that "the framers of our constitution intended a total and entire prohibition of slavery in this State; and we can conceive of no form of words in which that intention could have

9. IND. CONST. art. XI, § 7 (1816).

10. The actual handwritten record of proceedings in this case is still maintained in the state archives at the Indiana State Library, Indianapolis.

11. 1 Blackf. 60 (Ind. 1820).

been more clearly expressed."¹² The court also awarded Polly \$26.12 in costs for her trouble.¹³

This declaration against slavery was not temporary. Some thirty years later, as the nation began the slide toward civil war, the Indiana Supreme Court demonstrated anew its opposition to slavery and the laws that supported it. The court invalidated an act of the general assembly making it a crime to induce the escape of a slave or to hide one.¹⁴ Ironically, the court used as part of its authority a decision of the United States Supreme Court *affirming* fugitive slave laws, *Prigg v. Pennsylvania*.¹⁵ In *Prigg*, the Taney Court struck down a Pennsylvania law which prohibited the recapture and return of fugitive slaves.¹⁶ The Court held that states could not invade the exclusive jurisdiction of the federal government when it came to dealing with runaway slaves.¹⁷ Because the Indiana statute dealt with the subject of runaway slaves, our court reasoned in *Donnell v. State*,¹⁸ it was beyond the scope of a state's authority as limited by *Prigg*. Using *Prigg* to invalidate Indiana's inducement and harboring statute would today be akin to using *Brown v. Board of Education*¹⁹ to abolish busing. Such was the depth of our court's opposition to slavery that it used whatever precedent it could find, even Taney precedent, to further freedom for all. While the Court in Washington looked for ways to protect slaveowners, the Indiana court looked for ways to protect slaves.

Eventually, the Indiana Supreme Court was confronted with a case involving the very federal fugitive slave laws which the United States Supreme Court had upheld in *Prigg*. There was little our court could do when United States marshals began appearing in the state to take possession of slaves and return them to their owners. Still, the Indiana Supreme Court in *Freeman v. Robinson*²⁰ held that a slave had the right

12. *Id.* at 62.

13. *Id.*

14. *Donnell v. State*, 3 Ind. 480 (1952). *See also* *Degant v. Michael*, 2 Ind. 396 (1850) (slave owner not entitled to warrant for runaway slave); *Graves v. State*, 1 Ind. 368 (1849) (Indiana statute providing slaveholders with warrants for arrest of runaway slaves unconstitutional). Thereafter, the U.S. Supreme Court specifically held that states had the authority to pass laws against assisting fugitive slaves. *Moore v. Illinois*, 55 U.S. (4 How.) 13 (1852). Faced with the decision in *Moore v. Illinois*, the Indiana Supreme Court overruled *Donnell v. State* and *Degant v. Michael*. *State v. Moore*, 6 Ind. 436, 437 (1855).

15. 41 U.S. (16 Pet.) 539 (1842).

16. *Id.* at 613.

17. *Id.* at 562.

18. 3 Ind. 480 (1852).

19. 347 U.S. 483 (1954).

20. 7 Ind. 321 (1855).

to sue the marshal in state court for assault and battery occurring during the arrest and for extortion, that is, charging the slave three dollars a day for his own upkeep.²¹ The court held, "the assault and battery, and the extorting of money were no part of his official duty, under that or any other act, and were unlawful," implicitly agreeing that charging Freeman three dollars a day for his keep might fairly be called extortion.²² Because Congress had not legislated on these matters, Judge Gookins wrote for the court, "[W]e do not see that it is possible there should be any conflict between federal and state authorities."²³

These cases provide a dramatic contrast to the approach taken in other states, including our neighbor Illinois, which did not outlaw slavery for another twenty-five years.²⁴ As for the United States Supreme Court, the decision in *Prigg v. Pennsylvania* was just the beginning. The conclusion of Chief Justice Taney in *The Dred Scott Case*²⁵ that slaves were property was a significant contribution to the schism ultimately leading to the Civil War.

B. Counsel for the Poor

The mid-nineteenth century saw other progressive actions by both the Indiana legislature and the supreme court, including a major milestone in the criminal law. In 1854, the Indiana Supreme Court held in *Webb v. Baird*²⁶ that a circuit court had the power to appoint counsel for a pauper defendant in criminal cases saying:

It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. No Court could be respected, or respect itself, to sit and hear such a trial.²⁷

21. *Id.* at 322.

22. *Id.* at 323.

23. *Id.* Nevertheless, the marshal won because Freeman sued him in the wrong jurisdiction. *Id.* at 324.

24. See *Jarrot v. Jarrot*, 7 Ill. (2 Gilm.) 1 (1845).

25. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (upholding the right of property in slaves guaranteed by the Constitution and voiding provisions of the Missouri Compromise of 1820 which had prohibited slavery in new American territory acquired in the Louisiana Purchase). Wrote Chief Justice Taney, a Southern partisan, "[N]o word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles *property of that kind* to less protection than property of any other description." *Id.* at 452 (emphasis added).

26. 6 Ind. 14 (1854).

27. *Id.* at 18.

The court's holding was based on both statute and the Indiana Constitution.²⁸ A good many states recognized the right of a pauper to have counsel in criminal cases.²⁹ What made Indiana a leader was its adoption of the notion that the duty to pay for such services lay with the public.³⁰ The rule in most states was that absent a specific statute or court rule, counsel appointed for an indigent defendant had no right to compensation at public expense.³¹

Indiana's leadership in this field is all the more remarkable in light of the approach taken by the federal courts. In the federal court system, indigent defendants were not constitutionally guaranteed the right to counsel in all criminal prosecutions until 1938.³² Moreover, Indiana acted more than a century before the United States Supreme Court held in *Gideon v. Wainwright*³³ that the Fourteenth Amendment requires the appointment of counsel for indigents.³⁴

28. In holding that an appointed attorney had a right to be paid, the court quoted article 1, section 21 of the Indiana Constitution, "that no man's services shall be demanded without just compensation" *Id.* at 15. The grounds for compelling the county to pay counsel were somewhat vague, though the court did cite a statute which allowed the court to pay "reasonable sums for fuel and necessary articles furnished, and extra services performed, during the term of the Court." *Id.* of 17.

29. By 1868, most states provided indigent defendants with appointed counsel. See THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 334 (1868) ("With us it is a universal principle of constitutional law, that the prisoner shall be allowed a defense by counsel. The humanity of the law has generally provided that, when the prisoner is unable to employ counsel, the court may designate some one to defend him. . .").

30. Few states imposed a duty on the public to pay for such services. We have found only two. *Hall v. Washington County*, 2 Green 473 (Iowa 1850); *Carpenter v. Dane County*, 9 Wis. 249 (1859).

31. See, e.g., *Posey & Tompkins v. Moble County*, 50 Ala. 6 (1873); *Arkansas County v. Freeman & Johnson*, 31 Ark. 266 (1876); *Rowe v. Yuba County*, 17 Cal. 61 (1860); *Elam v. Johnson*, 48 Ga. 348 (1873); *Vise v. Hamilton County*, 19 Ill. 78 (1857); *Case v. Board of County Comm'rs*, 4 Kan. 511 (1868); *State v. Simmons*, 10 So. 382 (La. 1891); *Dismukes v. Board of Supervisors*, 58 Miss. 612 (1881); *Kelley v. Andrew County*, 43 Mo. 338 (1869); *Johnston v. Lewis & Clarke County*, 2 Mont. 159 (1874); *People ex rel. Ransom v. Board of Supervisors*, 78 N.Y. 622 (1879); *Wayne County v. Waller*, 90 Pa. 99 (1879); *Wright v. State*, 50 Tenn. 256 (1871); *Pardee v. Salt Lake County*, 118 P. 122 (Utah 1911); *Presby v. Klickitat County*, 31 P. 876 (Wash. 1892); *Yates v. Taylor County Ct.*, 35 S.E. 24 (W. Va. 1900). Various rationales were advanced to support the denial of attorney compensation including that it was an attorney's duty as an officer of the court to render services without compensation, that the attorney consented to rendering uncompensated service when he accepted his license to practice law, and that the court did not have the power to award compensation absent a specific statute.

32. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

33. 372 U.S. 335 (1963).

34. *Id.* at 339.

C. *Women in the Profession*

The Indiana Supreme Court also took a forward-looking approach to the admission of women to the bar. During the nineteenth century, admission to the bar of this state was open to people who had never attended law school, in accordance with a provision in the Indiana Constitution which declared: “[E]very person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice.”³⁵ People seeking admission typically presented their credentials to a local court. Antoinette Dakin Leach presented her credentials to the Greene Circuit Court and that court declined to admit her to the bar because she was not a voter (being a woman, she could not vote).³⁶ The Indiana Supreme Court ordered the admission of Ms. Leach, saying:

If nature has endowed woman with wisdom, if our colleges have given her an education, if her energy and diligence have lead her to a knowledge of the law, and if her ambition directs her to adopt the profession, shall it be said that forgotten fiction must bar the door against her?³⁷

This approach was in stark contrast to the position the Illinois Supreme Court took when Myra Bradwell petitioned for admission to the bar in Illinois. That court denied her admission solely on the grounds that she was a woman.³⁸ The applicable Illinois statute did not specifically exclude women from admission to the practice of law, but the Illinois Supreme Court stated that at the time of the statute’s enactment, “God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply and execute the laws, was regarded as an almost

35. IND. CONST. art. 7, § 21 (repealed 1932). This section was abrogated by virtue of its submission to the voters at the general election of November 8, 1932. The vote was 439,949 in favor of repeal and 236,613 against repeal. See *In re Todd*, 193 N.E. 865 (Ind. 1935).

36. *In re Leach*, 34 N.E. 641 (Ind. 1893). Hon. Sue Shields, *Remarks Before the Indianapolis Bar Association Upon Receiving the Woman Lawyers Division Antoinette Dakin Leach Award*, reprinted in RES GESTAE, June 1990, at 588-92 (Antionette Dakin Leach was the first woman lawyer in Indiana). Compare *In re Leach with Gougar v. Timberlake*, 148 Ind. 38 (1897) (state constitutional provision giving male citizens the right to vote held not violative of federal constitution; right to vote is political privilege held only by those to whom it is granted, and state constitution did not grant the privilege to females). It is interesting to note the court’s willingness to go beyond the constitutional language when admission to the bar was at stake and the court’s unwillingness to go beyond the language of the Indiana Constitution to resolve the issue of women’s suffrage. Perhaps this is explained by the court’s traditional role of overseeing and maintaining the bar.

37. *In re Leach*, 34 N.E. at 641.

38. *In re Bradwell*, 55 Ill. 535 (1869).

axiomatic truth.”³⁹ The Illinois court thus refused to allow a woman to be admitted to the practice of law because the legislature had not specifically provided for doing so and because at the time of the statute the sentiment was that women did not make, apply, or execute laws.⁴⁰ The court said “the sex of the applicant” was “a sufficient reason for not granting this license.”⁴¹ Mrs. Bradwell sought review in the Supreme Court of the United States. That Court affirmed the Illinois decision, one concurring Justice stating “The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator.”⁴² The Illinois legislature subsequently enacted a statute providing for the admission of women to the bar.

The federal courts also declined to admit women to the bar absent specific statutory authority. In 1873, the Court of Claims denied Mrs. Belva Lockwood’s petition for admission and held that women were without legal capacity to be attorneys.⁴³ In 1876, the United States Supreme Court also denied her petition because under the uniform practice of the court “none but men are admitted to practice before it as attorneys and counsellors.”⁴⁴ It took an act of Congress specifically providing for the admission of women to the bar to accomplish what Indiana courts did through benevolent analysis of legislative intent.⁴⁵

D. Illegal Search and Seizure

Finally, Indiana was an early adherent to the exclusionary rule. In 1922, the Indiana Supreme Court, using the Indiana Constitution, adopted the exclusionary rule to protect Hoosiers against unreasonable searches and seizures.⁴⁶ Our court unanimously stated, “If the property was secured by search and seizure under the pretext of a search warrant, which was invalid for any reason, then the property so seized could not

39. *Id.* at 539. It is interesting to note that the court also stated it would “cheerfully obey” a legislative enactment authorizing the admission of women to the bar, “trusting to the good sense and sound judgment of women themselves, to seek those departments of the practice in which they can labor without reasonable objection.” *Id.* at 542.

40. *Id.*

41. *Id.* at 537.

42. *Bradwell v. State*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

43. *In re Lockwood*, 9 Ct. Cl. 346 (1873).

44. *See Lelia Robinson’s Case*, 131 Mass. 376, 383 (1881) (quoting an authentic copy of an unreported United States Supreme Court decision).

45. Act of February 15, 1879, ch. 81, 20 Stat. 292 (women who have been a member of the bar of the highest court of any state or the District of Columbia for five years, have maintained good standing, and are of good moral character, shall be admitted to practice before the Supreme Court of the United States).

46. *Callender v. State*, 138 N.E. 817 (Ind. 1922).

be used as evidence, against the appellant and its admission over his objection was prejudicial error.”⁴⁷ Indiana took a progressive view of this issue at a time when the exclusionary rule was unpopular in the legal community.⁴⁸ Decades after Indiana acted, courts in other states continued to admit illegally obtained evidence. It was the practice of admitting such evidence in neighboring Ohio which, forty years after our decision, led the United States Supreme Court to prohibit the practice in *Mapp v. Ohio*.⁴⁹

II. PROGRESS AND THE POST-WAR PERIOD

Just as the nineteenth century was a period when law was largely given through the common law, the twentieth century has been a century dominated by law given through legislation.⁵⁰ One need only examine the annual statutes of Indiana to recognize the dramatic rise in subjects which have become the subject of legislation, especially after the general assembly began meeting every year instead of every other year.⁵¹

I take as one sign of Indiana lawmakers’ interest in progressive legislation their willingness to make use of uniform acts. The National Conference of Commissioners on Uniform State Laws recognizes that with the development of rapid transportation and communication, the states have become increasingly interdependent socially and economically.⁵² They labor over uniform statutes as a way to assist states in dealing with the challenges of modern America. The general objects of the Commissioners are to alleviate the potential deterrent to the free flow of goods, credits, services, and persons between the states; minimize the restraint of economic and social development; and reduce the pressure for federal intervention to compel uniformity.⁵³ The Commissioners un-

47. *Id.* at 818.

48. In the 1920s, Professor Wigmore called the exclusionary rule revolutionary and characterized it as against all rules of evidence pertaining to the subject. JOHN H. WIGMORE, *EVIDENCE*, §§ 2183, 2184 (1961) (2d ed. 1923).

49. 367 U.S. 643 (1961).

50. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

51. As one might expect, our general assembly has become more prolific over the decades. In 1911, the legislature enacted about 1,200 sections of law spanning more than 700 pages. In 1951, about 1,900 sections of law were enacted by about 1,100 pages of legislative work product. In 1991, the general assembly produced more than 6,200 sections of law in 3,390 pages. See *Indiana Code Session Law Tables* (1988 & Supp. 1991).

52. *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAW AND PROCEEDINGS* 459-60 (1986) [hereinafter *HANDBOOK*].

53. *Id.* at 460. Of course, the various uniform laws have more specific and distinct purposes. For example, the Uniform Anatomical Gift Act intends to enlarge the class of possible donors by as much as possible and to eliminate time-consuming questions about organ donation in light of the limited time available after death to remove critical tissues successfully. UNIF. ANATOMICAL GIFT ACT § 2 (1968 Act), 8A U.L.A. 35 cmt. (1983).

dertake to do so by promoting "uniformity in state law on all subjects where uniformity is desirable and practicable."⁵⁴

The Indiana General Assembly has built a substantial record of adopting these acts: prior to the 1991 legislative session our legislature had adopted thirty uniform state laws.⁵⁵ As I mentioned earlier, Indiana was the first state to adopt the Uniform Health Care Consent Act, the adoption of which in 1987 provided a base for our 1991 *Lawrance* decision.⁵⁶ We were also the first to adopt the Uniform Testamentary Additions to Trust Act,⁵⁷ and one of the first handful of states to adopt the Uniform Anatomical Gift Act of 1968,⁵⁸ the Uniform Simultaneous Death Act,⁵⁹ the Uniform Act to Secure Attendance of Witnesses,⁶⁰ and the Uniform Criminal Extradition Act.⁶¹ The trend continued in 1991, when our general assembly adopted the Uniform Statutory Rule Against Perpetuities Act.⁶² The legislature has also been willing to act on a host of challenges which are not covered by uniform acts.⁶³

The year 1991 was also a year when Indiana courts moved forward progressively on a host of fronts. Indiana became one of the first states to adopt minimum standards for lawyers who represent defendants in capital cases.⁶⁴ Promoting such standards has been a struggle for those committed to improving representation of such defendants. In 1990, the director of the National Legal Aid and Defender Association stated that although they have been urging states to adopt minimum standards, there has been "almost no progress."⁶⁵ Before our court acted, only Ohio had a court rule regarding minimum standards.⁶⁶

Besides the *Lawrance* case, Indiana has taken up a host of other questions in recent years which advance the law. In doing so, I have

54. HANDBOOK, *supra* note 52, at 459.

55. UNIFORM LAWS ANNOTATED, MASTER EDITION, DIRECTORY OF UNIFORM ACTS AND CODES 24 (1991). The Durable Power of Attorney Act was repealed during the 1991 session. See IND. CODE §§ 30-2-11-1 to -7, *repealed by* Pub. L. No. 149-1991, § 6 (1991).

56. IND. CODE ANN. §§ 16-8-12-1 to -13 (West 1992).

57. IND. CODE § 29-1-5-9 (Supp. 1991).

58. IND. CODE §§ 29-2-16-1 to -11 (1988 & Supp. 1991).

59. IND. CODE §§ 29-2-14-1 to -8 (1988).

60. IND. CODE §§ 35-33-10-3 to -7 (1988).

61. IND. CODE §§ 35-37-5-1 to -9 (1988).

62. IND. CODE §§ 32-1-4.5-1 to -6 (Supp. 1991).

63. Our general assembly broke new ground in 1985 when it authorized the admissibility of videotaped wills in probate proceedings. IND. CODE § 29-1-5-3(c) (Supp. 1991). This led one commentator to laud Indiana for being "the pioneering exception." William R. Buckley, *Indiana's New Videotaped Wills Statute: Launching Probate Into the 21st Century*, 20 VAL. U. L. REV. 83, 83 (1985).

64. See IND. CRIM. R. 24 (amended Oct. 25, 1991).

65. Marcia Coyle et al., *Fatal Defense, Trial and Error in the Nation's Death Belt*, NAT'L L.J., June 11, 1990, at 30, 44.

66. See RULES OF SUPERINTENDENCE FOR COURTS OF COMMON PLEAS 65 (1991).

been mindful of the advice my friend Professor E. Donald Elliott of Yale gave me about the pitfalls involved in our court's new venture into civil law after the voters adopted Proposition Two in 1988.⁶⁷ If you have not touched a subject since 1940, he said, and all you do now is do what others did in 1960, you may miss the opportunity to correct the mistakes of 1960. You have to find new solutions.

Our decision concerning the traditional rule of *lex loci*, for instance, reflects advancements in our law crafted to take account of the choices made elsewhere. *Hubbard Manufacturing Co., Inc. v. Greeson*⁶⁸ follows an earlier Indiana case adopting the substantial contacts test for choice of law in contract disputes.⁶⁹ We could have adopted the 1971 Restatement (Second) of Conflicts of Law, which includes a full significant contracts test, but the Restatement has been subject to a great deal of criticism on grounds that it provides insufficient certainty.⁷⁰ Though some have thought of us as adopting a straightforward significant contact test, we chose purposefully to find another course. We observed that in a large number of cases the place of the tort will be significant and will be the place with the most contacts. In such cases, the traditional rule of *lex loci delicti commissi* serves well and should be applied.⁷¹ "In those instances where the place of the tort bears little connection to the legal action," the factors constituting the heart of the Restatement's significant contacts test may be considered in determining what state's law to apply.⁷² This formulation makes *lex loci* a kind of "first option" and may prove to provide greater predictability than the Second Restatement.

There were several cases decided in 1991 which moved the law. In *Picadilly, Inc. v. Raikos*,⁷³ the court analyzed public policy and history in deciding that an assignment of a legal malpractice claim was invalid.⁷⁴

67. See generally Randall T. Shepard, *Changing the Constitutional Jurisdiction of the Indiana Supreme Court: Letting a Court of Last Resort Act Like One*, 63 IND. L.J. 669 (1988).

68. 515 N.E.2d 1071 (Ind. 1987).

69. *W.H. Barber Co. v. Hughes*, 63 N.E.2d 417 (Ind. 1945).

70. See, e.g., ROBERT LEFLAR, *AMERICAN CONFLICTS LAW* 184-85 (3d ed. 1977) (the Restatement Second affords no real basis for decision in hard cases because it does not identify the considerations which move courts to go one way or the other within the formula); EUGENE F. SCHOLES & PETER HAY, *CONFLICT OF LAWS* § 2.14 (1982) (Restatement Second drew severe criticism while in preparation and upon its adoption); Albert A. Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for its Withdrawal*, 113 U. PA. L. REV. 1230 (1965); Albert A. Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 388 (1966); Herma H. Kay, *Theory Into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 561-62 (1983).

71. *Hubbard*, 515 N.E.2d at 1073.

72. *Id.* at 1073-74.

73. 582 N.E.2d 338 (Ind. 1991).

74. *Id.* at 345.

*Tittle v. Mahan*⁷⁵ and *City of Wakarusa v. Holdeman*⁷⁶ provided a reasonably bright line defining what conduct qualifies as "enforcement of the law" so as to confer law enforcement immunity under the Indiana Tort Claims Act. In *Cowe v. Forum Group, Inc.*,⁷⁷ the court examined an emerging national issue and chose not to recognize a cause of action for damages for wrongful life.⁷⁸

The Indiana Supreme Court also decided a number of cases dealing with use of advanced technology during trials. In *Hopkins v. State*,⁷⁹ the court was asked to decide whether DNA testing would be admissible to prove an accused perpetrator's identity. In answering this question in the affirmative, we went on to say that once the trial court has ruled that the testifying witness is a qualified expert in DNA testing, subsequent evaluation of the evidence goes towards its weight, not its admissibility.⁸⁰ More interesting than this conclusion, Justice Brent Dickson reminded us about Indiana's ambivalence concerning the ubiquitous *Frye* test.⁸¹

Our trend of using the Indiana Constitution continued. In *Brady v. State*,⁸² the court faced the question of whether the use of videotaped testimony of a child abuse victim violated a criminal defendant's constitutional right to confront witnesses against him.⁸³ The court held that although use of such testimony was permissible under the federal Constitution, the Indiana Constitution ensures defendants a greater right, to meet witnesses against them "face to face."⁸⁴ Therefore, the use of one-way videotaped testimony, where the defendant can see the witness but the witness cannot see the defendant, is not permitted under the Indiana Constitution. Use of two-way closed circuit television, however, would be permissible.⁸⁵

Indiana has also played a leading role in the national debate over medical malpractice. Indiana was the first state to adopt a comprehensive set of medical malpractice reforms, the Indiana Medical Malpractice Act.⁸⁶ It is one of the most sweeping set of reforms in the country and

75. 582 N.E.2d 796 (Ind. 1991).

76. 582 N.E.2d 802 (Ind. 1991).

77. 575 N.E.2d 630 (Ind. 1991).

78. *Id.* at 634.

79. 579 N.E.2d 1297 (Ind. 1991).

80. *Id.* at 1303.

81. *Id.* at 1305-07 (Dickson, J., concurring).

82. 575 N.E.2d 981 (Ind. 1991).

83. *Id.* at 988.

84. *Id.* (citing IND. CONST. art. I, § 13).

85. *Id.* at 909.

86. IND. CODE §§ 16-9.5-1-1 to -10-5 (1988 & Supp. 1991).

is considered a national model.⁸⁷ Although it has been the subject of recurring criticism,⁸⁸ the Act has been credited with allowing Indiana physicians to have some of the lowest medical malpractice insurance premiums in the country and is said to encourage malpractice insurers and health care professionals to settle claims, particularly large ones.⁸⁹

The Indiana courts decided a number of important medical malpractice cases in 1991. In *Centman v. Cobb*,⁹⁰ the court of appeals held that the medical malpractice standard of care for a post-graduate intern or first-year resident with a valid temporary medical permit is the same standard of care applicable to physicians with unlimited licenses to practice medicine.⁹¹ They must "exercise the reasonable and ordinary degree of skill, care, and diligence generally possessed, exercised, and accepted by members of their profession," including fully licensed doctors, who practice in the same or similar localities.⁹² In *McCarty v. Hospital Corp. of America*,⁹³ the Indiana Supreme Court clarified the circumstances in which an amendment to a pleading can relate back to the original date the suit was filed. The court noted that the emphasis on "cause of action" language was unduly rigid and held that the factual circumstances that gave rise to the original claim must be examined.⁹⁴ If the amendment is based on the same factual circumstances as those in the original complaint, relation back is permissible.⁹⁵

I take citation by other courts as an indication that Indiana is resolving in a thoughtful way important questions which others need to address. During 1991, the Indiana Supreme Court was cited by other state courts at least 169 times.⁹⁶ Sixty-three of these citations were to cases we decided in 1985 and after. In one of these cases, the Tennessee

87. See Joseph Hallinan & Susan Headden, *A Case of Neglect: Medical Malpractice in Indiana*, INDIANAPOLIS STAR, June 26, 1980, at 1; Isabel Wilkerson, *Indiana Law at Center of Malpractice Debate*, N.Y. TIMES, Aug. 20, 1990, at 13 ("24 other states have followed Indiana's lead and set limits on the amount awarded in malpractice cases").

88. See Hallinan & Headden, *supra* note 87, at 9 (arguing that the act benefits doctors and insurance companies far more than patients and their families); Wilkerson, *supra* note 87 (noting that although most injured patients receive adequate compensation, patients with the most serious injuries, especially those who will require life long care, cannot be adequately compensated because the cap on damages).

89. Eleanor D. Kinney et al., *Indiana's Medical Malpractice Act: Results of a Three-Year Study*, 24 IND. L. REV. 1274, 1298, 1302 (1991).

90. 581 N.E.2d 1286 (Ind. App. 1991).

91. *Id.* at 1288.

92. *Id.* at 1290.

93. 580 N.E.2d 228 (Ind. 1991).

94. *Id.* at 230-31.

95. *Id.* at 231.

96. The Indiana Court of Appeals was cited by other state courts at least 200 times in 1991.

Supreme Court overruled seventy years of authority on the subject of governmental immunity when it decided *Bowers v. City of Chattanooga*.⁹⁷ The Tennessee court relied principally on our decision in *Peavler v. Monroe County Board of Commissioners*⁹⁸ in fashioning a new standard for distinguishing which acts are entitled to governmental immunity. The Tennessee Supreme Court adopted the "planning-operational" test from *Peavler*.⁹⁹ New York's highest court relied on an Indiana decision, *In re Terry*,¹⁰⁰ in deciding that prosecutor Elizabeth Holtzman, who released to the media unsubstantiated allegations of wrongdoing by a judge, was subject to disciplinary action.¹⁰¹ New Jersey's intermediate appellate court cited *Stewart v. State*¹⁰² for the proposition that an expert cannot testify that another witness is telling the truth,¹⁰³ and the Court of Appeals of Maryland cited *Cox v. State*¹⁰⁴ in concluding that words alone are not adequate provocation to reduce murder to manslaughter.¹⁰⁵ The Supreme Court of Appeals of West Virginia relied largely on Indiana law in *Waugh v. Traxler*.¹⁰⁶ That court cited *Witham v. Norfolk & Western Railway Co.*¹⁰⁷ in deciding what evidence a party must produce to rebut the presumption of negligence in the context of a traffic violation, an issue of first impression in that jurisdiction. West Virginia adopted the same standard used by Indiana.¹⁰⁸

III. CONCLUSION

To be sure, the progress of American society and of Indiana law is not always straight forward. There are plenty of occasions for discouragement, disillusionment, missteps, or downright embarrassment. Still, in our better moments, Indiana exemplifies an ennobling determination to build a better future. The essence of the American experiment has always been such a determination. The nation and the state cannot look toward the future in any other way.

97. No. 03S01-9104CV0023, 1992 WL 33945 (Tenn. Feb. 18, 1992).

98. 528 N.E.2d 40, 45 (Ind. 1988).

99. *Bowers*, No. 03S01-9104CV0023, 1992 WL 33945, at *3 (Tenn. Feb. 18, 1992).

100. 394 N.E.2d 94 (Ind. 1979).

101. *In re Holtzman*, 577 N.E.2d 30, 33-34 (N.Y. 1991).

102. 555 N.E.2d 121 (Ind. 1990).

103. *State v. J.Q.*, 599 A.2d 172, 188 (N.J. Super. Ct. App. Div. 1991).

104. 512 N.E.2d 1099 (Ind. 1987).

105. *Girouard v. State*, 583 A.2d 718, 722 (Md. 1991).

106. 412 S.E.2d 756 (W. Va. Dec. 13, 1991).

107. 561 N.E.2d 484 (Ind. 1990).

108. *Witham*, 412 S.E.2d at 760.

Mediation: An Analysis of Indiana's Court-Annexed Mediation Rule

JOHN R. VAN WINKLE*

Mediation is the primary focus of the adopted Rules for Alternative Dispute Resolution (ADR Court Rules) which went into effect in Indiana on January 1, 1992.¹ The rules describe mediation as a process in which a neutral third person acts to encourage and to assist in the resolution of a dispute. The ADR Court Rules also provide for arbitration, mini-hearings, summary jury trials, and private judges. Because of the specific emphasis on mediation, however, this paper will concentrate on that method of dispute resolution and examine both the development of the ADR Court Rules generally and the specifics of the mediation aspect of the Rules.

I. HISTORICAL BACKGROUND AND DEVELOPMENT OF ADR COURT RULES

The ADR Court Rules had their origin in a 1985 request from the President of the Indiana State Bar Association (ISBA) to the Young Lawyers Section of that Association. The possibility of an examination of alternative dispute resolution methods was raised in a regular column in the February 1985 issue of *Res Gestae* entitled *Alternative Dispute Resolution—Has Its Time Come?*² The Young Lawyers Section was subsequently asked to organize a committee (YLS Committee) to investigate the feasibility of ADR in Indiana. The YLS Committee began work in late 1985 and researched various forms of ADR in effect or proposed in other jurisdictions. In October of 1986, the YLS Committee presented an overview of its initial research to the ISBA. The ISBA House of Delegates directed the investigation of ADR to continue by converting and expanding the YLS Committee into a special committee of the ISBA (ISBA ADR Committee). In April of 1987, the ISBA ADR

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1. The Indiana Alternative Dispute Resolution Rules [hereinafter IND. A.D.R. RULE] are printed at 580 N.E.2d XCII (Dec. 4, 1991).

2. Ted B. Lewis, *Alternative Dispute Resolution—Has Its Time Come?*, 28 RES GESTAE 411, 413 (1985).

Committee's report to the ISBA House of Delegates indicated that a proposed rule had been formulated based on the court-annexed procedures established in Michigan.³ At that time, the ISBA ADR Committee focused on court-annexed, non-binding arbitration for civil cases, with liability or sanctions for attorney's fees and costs for parties who rejected the arbitration evaluation but who did not obtain more favorable results at trial.

Drafting of the proposed rules began after an organizational meeting of the ISBA ADR Committee.⁴ Although the basis for the contemplated Rules was the rules in Michigan,⁵ different committee members drafted the various sections of the proposed rules.⁶ The first draft of the ADR Rules prepared by the ISBA ADR Committee was presented to the ISBA Board of Managers in July of 1989 (First Draft).⁷

The major thrust of the First Draft was court-annexed arbitration. Although those proposed rules provided that "a court may select any civil plenary case for arbitration,"⁸ the experience in Michigan (and the expectation for the Indiana rules) was that the majority of cases would be submitted to arbitration. The First Draft provided for a panel of three arbitrators to conduct an informal hearing and arrive at a written evaluation.⁹ If a plaintiff rejected or refused to accept the written arbitrator's evaluation, and the ultimate verdict was not at least ten percent greater than the evaluation, the plaintiff could be assessed defendant's costs and attorney's fees "for services rendered as a result of the plaintiff's rejection of the arbitration evaluation."¹⁰

Likewise, if a defendant rejected the evaluation, he could be assessed costs and fees if the ultimate verdict was not at least ten percent less

3. Excerpt from transcript of Report from E. Spencer Walton, Jr., former Chairman of the Young Lawyers Section of the Indiana State Bar Association [hereinafter ISBA] and current Chairman of the Indiana Alternate Dispute Resolution Committee of the ISBA [hereinafter ISBA ADR Committee] to the ISBA House of Delegates (Apr. 9, 1987).

4. Minutes of meeting of the ISBA ADR Committee (Feb. 25, 1987).

5. MICH. COMP. LAWS ANN. §§ 600.4951 to -.5001 (West 1991); MICH. CT. R. 2.403.

6. Interview with E. Spencer Walton, Jr., Chairman of the Indiana Alternative Dispute Resolution Committee of the ISBA, in Indianapolis, Indiana (Jan. 1992) [hereinafter Walton Interview]; Interview with Bruce A. Kotzan, Indiana State Court Administrator, in Indianapolis, Indiana (Jan. 1992) [hereinafter Kotzan Interview]; Minutes of meeting of the ISBA ADR Committee (Apr. 13, 1989).

7. First Draft of Proposed Alternative Dispute Resolution Court Rules of the ISBA ADR Committee [hereinafter First Draft].

8. First Draft, *supra* note 7, Rule 2.1.

9. First Draft, *supra* note 7, Rules 2.2, 2.7.

10. First Draft, *supra* note 7, Rule 2.8.

than the evaluation.¹¹ Although not precisely stated, the language of Rule 2.8 of the First Draft could have been interpreted to require payment by a rejecting party of all attorney's fees incurred by a party after the rejection of the evaluation.¹² This provision of the First Draft would have attached significant jeopardy to a party rejecting an arbitration evaluation because such fees could obviously be substantial.

In September of 1989, the Chairman of the ISBA ADR Committee presented to the ISBA Board of Managers a proposed plan of action for educating the Bar and for presenting the proposal to the Supreme Court of Indiana. In December of 1989, that Committee and the Indiana Supreme Court Administrator presented the First Draft to the Supreme Court of Indiana for consideration.¹³

On August 30, 1990, Chief Justice Randall T. Shepard wrote to the Chairman of the ISBA ADR Committee stating, "The Supreme Court has approved in principle adoption of rules authorizing expanded use of accelerated dispute resolution in Indiana."¹⁴ In the letter, Chief Justice Shepard also requested that the ISBA ADR Committee "review the existing proposals and prepare a final rule for the Court's consideration."¹⁵ This letter, demonstrating the Indiana Supreme Court's receptiveness toward ADR, intensified the interest of the general Bar in the ADR proposal.

The ISBA expanded its Committee to include representatives of the Indiana Trial Lawyers Association (ITLA) and the Indiana Defense Lawyers Association (IDLA). Representatives of the ITLA and IDLA joined the Committee for a meeting held January 12, 1991. The ITLA member expressed "concern" about the First Draft and told the Committee that the ITLA was opposed to what, under the proposal, would be mandatory ADR.¹⁶

The real focus of the ITLA's criticisms was the First Draft provision which included sanctions of both attorney's fees and costs. In a regular column in the *Indiana Lawyer*, sponsored by the ITLA, a spokesman stated:

The issue of sanctions is a primary concern of the [ITLA] in the event non-binding arbitration is the ADR method agreed on. . . . The ITLA's position regarding sanctions is that the losing side is already penalized by receiving less damages for

11. *Id.*

12. *Id.*

13. Walton Interview, *supra* note 6; Kotzan Interview, *supra* note 6.

14. Letter from Randall T. Shepard, Chief Justice of the Supreme Court of Indiana, to E. Spencer Walton, Jr. (Aug. 30, 1990).

15. *Id.*

16. Chris Banguis, *ISBA Group Shares Ideas, Concerns About ADR*, IND. LAW. Jan. 30-Feb. 12, 1991, at 6.

more work and costs incurred in presenting the case to a jury, costs which are often substantial.¹⁷

This position of the ITLA ignored one of the most significant rationales for the original sanction provision: to partially reimburse defendants for fees and costs incurred as a result of the unreasonable rejection by plaintiffs of arbitration evaluations.

Instead of addressing the potential loss to a defendant who ultimately prevails, the ITLA focused on the potential embarrassment to, or liability of, a plaintiff's lawyer who rejects an arbitration evaluation. In the same column, ITLA's spokesman wrote:

In the event the plaintiff does receive a lower jury verdict than the arbitrator's award, the plaintiff's lawyer . . . will have to explain to the client that he or she would also have to pay attorney's fees and costs to the other side. Certainly a battle line would then be drawn between the plaintiff and his or her lawyer as to who pays these costs and attorney's fees, with the compelling conclusion that if the plaintiff's attorney doesn't pay it, he may be extending an open invitation to a legal malpractice suit.¹⁸

The attorney's fees sanction provision was also criticized because of the inherent differences between the arbitration procedure and trial. The arbitration process proposed in the First Draft would have been informal, without strict compliance to the rules of evidence. If a trial eventually ensued, however, a very different procedure, with rules of evidence and different dynamics would result. Critics of the attorney's fees provision contended that it is not fair to compare an arbitration evaluation with a trial verdict. As a result of these and other objections to mandatory arbitration with sanctions of costs and fees, the ISBA ADR Committee made an "about-face," dramatically changing the proposed ADR Rules.

Mandatory arbitration as well as the sanction of attorney's fees and costs were removed from the First Draft. Non-binding mediation became the central thrust of the final proposal of the ISBA ADR Committee. The final draft of the proposed rules (Final Draft) was submitted on February 28, 1991 to the Indiana Supreme Court Committee on Rules of Practice and Procedure (Rules Committee).¹⁹

On March 28, 1991, the Rules Committee, without making further changes, submitted the Final Draft to *Res Gestae* for publication and

17. Louis Buddy Yosha, *Alleviating Congested Court Dockets Through Accelerated Dispute Resolution*, IND. LAW., Mar. 27-Apr. 9, 1991, at 5.

18. *Id.*

19. IND. R. TRIAL PROC. 80.

solicitation of comments. A public hearing was also scheduled to be held on July 15, 1991.²⁰ Following the public hearing, the Rules Committee made minor changes in the Final Draft and submitted it to the Supreme Court of Indiana.²¹ On November 7, 1991, the Supreme Court of Indiana, with all justices concurring, adopted the ADR Court Rules to become effective January 1, 1992.²²

Persons attempting to apply or interpret the ADR Court Rules should consider two important facts in the developmental history of the Rules. First, the basic thrust of the Rules was changed dramatically during the process. The Rules began as mandatory arbitration, including significant attorney's fee sanctions for rejection of evaluations, and emerged primarily with a focus on non-binding mediation. Second, most of the terms, conditions, and provisions of the ADR Court Rules are unique because the Rules were drafted practically "from scratch." Although there are no other states or jurisdictions with rules of similar language, the mediation aspects of the ADR Court Rules are substantively similar to those that have been in effect in Florida since 1988.

II. ADR COURT RULES

A. *Preamble: General Observations*

The Preamble of the ADR Court Rules was slightly revised from the Final Draft. Ironically, however, the Final Draft omitted the statement that the Rules were adopted "with the view that the interests of the parties can be preserved in settings other than the traditional judicial dispute resolution method."²³ This indicates that the Supreme Court of Indiana did not share (or at least did not articulate) the ISBA's sensitivity that the ADR Rules should not be perceived as abandoning traditional procedure. As previously indicated, ISBA President John A. Grayson addressed the Indiana Bar's concerns that the proposed ADR Rules would take dispute resolution away from the courts and lawyers. Grayson explained:

[The] proposed ADR program never purported to remove the dispute resolution process from the advocacy system or from our existing judicial structure. The proposals that they [the committee members] have advanced in each case involve the adversarial system with legal counsel representing the parties and

20. IND. R. TRIAL PROC. 80(D).

21. *Id.*

22. *Id.*

23. Final Draft of Proposed Alternate Dispute Resolution Court Rules of the ISBA ADR Committee, Preamble [hereinafter Final Draft].

involve the judiciary in the administration of the procedures for accelerated dispute resolution.²⁴

Whether the Indiana Supreme Court intended to codify the position of the ISBA on this issue is potentially important. A debate has arisen in conjunction with the emergence of ADR. The central issue is whether inserting mandatory mediation principles (which are inherently intended to be nonadversarial) into the existing adversarial trial system taints or contorts the ADR technique.²⁵ Some commentators are concerned that "[l]awyers may use ADR not for the accomplishment of a 'better' result, but as another weapon in the adversarial arsenal to manipulate time, methods of discovery, and rules of procedure for perceived client advantage."²⁶

Rule 1.3(A) of the ADR Court Rules describes mediation as a "nonadversarial" process.²⁷ That phrase is not used to describe any of the other ADR methods. The conclusion could be reached, therefore, that the Supreme Court of Indiana hoped to thrust mediation into a highly aggressive and combative adversarial process without changing or altering the inherent conciliatory nature of mediation. This presumption is relevant to interpreting provisions of the ADR Court Rules.

The statement in the preamble that "[m]ediation is the primary form of alternative dispute resolution adopted under these rules"²⁸ seems less a legislative pronouncement than an acknowledgment of the change in emphasis from arbitration to mediation. Anecdotal information indicates that the Supreme Court of Indiana accepted the major shift in emphasis between the First Draft and the Final Draft to avoid objections voiced by certain groups and because the current Rules are seen as an initial step toward alternate dispute resolution in general.²⁹ If mediation works well, the court might be expected to move toward a consideration of mandatory arbitration.

24. John A. Grayson, 'What is This ADR Thing?,' 34 RES GESTAE 3, 5 (1990) (President's message from John A. Grayson).

25. Peter B. Edelman, *Institutionalizing Dispute Resolution Alternatives*, 9 JUST. SYS. J. 134 (1984); G. Thomas Eisele, *The Case Against Mandatory Court-Annexed ADR Programs*, 75 JUDICATURE 34 (1991); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or 'The Law of ADR'*, 19 FLA. ST. U.L. REV. 1 (1991) [hereinafter Menkel-Meadow, *Pursuing Settlement*]; Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. REV. 754 (1984); Neil Vidmar & Jeffery Rice, *Jury-Determined Settlements and Summary Jury Trials: Observations About Alternative Dispute Resolution in an Adversary Culture*, 19 FLA. ST. U.L. REV. 89 (1991).

26. Menkel-Meadow, *Pursuing Settlement*, *supra* note 25, at 3.

27. IND. A.D.R. RULE 1.3(A).

28. IND. A.D.R. RULE pmbl.

29. Walton Interview, *supra* note 6; Kotzan Interview, *supra* note 6.

B. General Provisions of the ADR Court Rules

Rule 1.1 lists twelve “recognized” ADR methods including several methods not mentioned in previous drafts of the Rules.³⁰ Rule 1.2 then specifies the five methods governed by the Rules.³¹ It must be assumed that the court attached some significance to the *recognition* of seven methods of ADR not covered by the Rules. This significance could be explained by reference to Rule 1.10 which provides that the ADR Court Rules “[do] not preclude a court from utilizing any other reasonable method or technique to resolve disputes.”³² If Rule 1.10 had stated any other *recognized* method or technique, a stronger argument could be made that the ADR Court Rules grant trial courts the authority to use the seven additional ADR methods listed in Rule 1.1. Because of the general nature of those methods (such as conciliation and facilitation) and because the word “reasonable” and not “recognized” was used, the most likely intent in Rule 1.1 was merely to acknowledge judicially, if not formally endorse, ADR techniques in use throughout the country.

Rule 1.3 purports to describe, not define, the five methods of ADR covered by the Rules: mediation, arbitration, mini-hearings, summary jury trials, and private judges.³³ In describing mediation, Rule 1.3 states that the objective is to help the parties reach an agreement “on all or any part of the issues in dispute.”³⁴ Rule 1.6 specifically provides that a judge can order a case “or selected issues” to be submitted to mediation or mini-hearing.³⁵

Rule 2.1 contemplates that a mediation agreement might not resolve all issues.³⁶ Thus, courts are given discretion to submit particular issues to mediation, in order to “reduce points of contention,”³⁷ if the entire case does not appear likely to be resolved. Likewise, mediators can encourage the parties to reach agreement on one or more issues, and may, with the consent of the parties, “identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of settlement.”³⁸

30. IND. A.D.R. RULE 1.1.

31. IND. A.D.R. RULE 1.2. The scope of the ADR includes: Mediation, Arbitration, Mini-hearing, Summary Jury Trials, and Private Judges.

32. IND. A.D.R. RULE 1.10.

33. IND. A.D.R. RULE 1.3.

34. IND. A.D.R. RULE 1.3(A).

35. IND. A.D.R. RULE 1.6.

36. IND. A.D.R. RULE 2.1.

37. *Id.*

38. IND. A.D.R. RULE 2.7(E)(1).

The methods, procedures, or techniques used by the mediators are within their discretion. Rule 1.3(A) uses language consistent with theories of mediation utilized in standard training courses. It provides that mediators should assist the parties "in identifying issues, fostering joint problem-solving, exploring settlement alternatives, and in other ways consistent with these activities."³⁹

C. Application of ADR Court Rules

Rule 1.4 provides that the ADR Court Rules apply to "all civil and domestic relations litigation" filed in all state courts, except for small claims proceedings.⁴⁰ Specific cases, such as forfeiture of seized properties and habeas corpus or other extraordinary writs, are excluded.⁴¹ Although not specified, "other extraordinary writs" would probably include writs of mandamus, assistance, attachment, *capias*, and others.

Rule 1.4(G) excludes "matters in which there is very great public interest, and which must receive an immediate decision in the trial and appellate courts."⁴² This provision was not in any of the drafts submitted by the ISBA ADR Committee. It could be assumed that the Supreme Court of Indiana was mindful of exceptional cases such as *In re Lawrance*,⁴³ which involved the right of a family to withdraw artificially provided nutrition and hydration from their incompetent daughter. In such cases, both the elements of public interest and the need for an immediate decision are required before the exception applies.

1. *Only Mediation and Mini-hearings Can Be Ordered Without Agreement of Both Parties.*—Rule 1.6 provides that any presiding judge can order the parties to participate in mediation or mini-hearings.⁴⁴ Conversely, arbitration and summary jury trials can only be ordered upon agreement of all parties. Likewise, although not mentioned in Rule 1.6, private judges can be ordered only by agreement of all parties, pursuant to the applicable statutes.⁴⁵

2. *Status of Case During Mediation.*—Two conflicting portions of the ADR Court Rules address the issue of the status of a case submitted to ADR. Rule 1.7 provides that "[f]or good cause shown and upon hearing on this issue, the court at any time may terminate the alternative dispute resolution process *and return the litigation to the regular docket.*"⁴⁶

39. IND. A.D.R. RULE 1.3(A).

40. IND. A.D.R. RULE 1.4.

41. IND. A.D.R. RULE 1.4(D), (E).

42. IND. A.D.R. RULE 1.4(G).

43. 579 N.E.2d 32 (Ind. 1991).

44. IND. A.D.R. RULE 1.6.

45. IND. CODE § 33-13-15-1 (1988).

46. IND. A.D.R. RULE 1.7 (emphasis added).

Rule 2.2, however, provides that “[i]f a case is ordered for mediation, the case *shall remain on the court docket and the trial calendar.*”⁴⁷

It must be concluded that the contradictory language in Rule 1.7 is a drafting error because Rule 3.2, regarding arbitration, and Rule 4.3, regarding mini-trials, expressly provide that cases assigned to the particular method “shall remain on the regular docket and trial calendar of the court.”⁴⁸ The probable intent was to specifically provide that, except as otherwise provided in the ADR Court Rules, cases submitted to ADR would be subject to the rules and procedures governing all civil cases. Rules concerning time, pleadings, third-party practice, dispositive motions, summary judgments, pretrials, “lazy judge” rules, and all other such rules presumably remain applicable during the mediation process because of the specific language of Rules 2.2, 3.2, and 4.3.

3. *Recordkeeping and Service of Papers.*—Rule 1.8 provides that when a case is submitted to ADR, the referral and subsequent entries of record shall be entered in the Chronological Case Summary by the clerk of the court.⁴⁹ Rule 1.9 provides that, during the ADR process, papers and other pleadings are to be served on the other party.⁵⁰ Such papers could include the following in connection with mediation: Motion to Submit Case to Mediation (Rule 2.2), Objection to Submission (Rule 2.2), Notification of Agreement on Selection of Mediator (Rule 2.4), Report of Striking From Panel of Mediators (Rule 2.4), Request to Replace Mediator (Rule 2.4), Agreement Concerning Rate for Mediator (Rule 2.6), Notice of Filing of Confidential Statement of Case (Rule 2.7(C)), Consent to Identification of Issues (Rule 2.7(E)(1)), Agreement (Rule 2.7(E)(2)), Motion for Sanctions for Failure to Perform Under Agreement (Rule 2.7(E)(3)), Petition for Sanctions for Failure to Comply with Rules (Rule 2.11), and Objection to Obtaining of Testimony or Physical Evidence (Rule 2.12).

4. *Immunity.*—Mediators and others acting under the ADR Court Rules have immunity from liability to the same extent as do judges in Indiana. Judges enjoy absolute immunity from “judicial” and “adjudicatory” acts (i.e., those done in the course of deciding a controversy), but not from actions which are more functionally administrative, legislative, or executive in nature.⁵¹ In the context of the ADR process then, mediators will be immune from liability for their actions during the process itself which are necessary to the procedure.

47. IND. A.D.R. RULE 2.2 (emphasis added).

48. IND. A.D.R. RULE 3.2, 4.3.

49. IND. A.D.R. RULE 1.8.

50. IND. A.D.R. RULE 1.9.

51. Forrester v. White, 484 U.S. 219 (1988).

5. *Submission of Case to Mediation.*—Pursuant to Rule 2.2, a civil case can be submitted to mediation either by the trial judge on his own motion or on the motion of either party.⁵² A case cannot be submitted to mediation by the court until fifteen days *after* the period allowed for a peremptory change of venue under Trial Rule 76(2) or 76(3) has expired.⁵³ Trial Rule 76 was amended December 6, 1991, effective February 1, 1992, and the automatic right to change of venue from the county no longer exists. The right to automatic change of judge remains (under Trial Rule 76) and presumably, Rule 2.2 will be amended to reflect this change. The time limit, however, will likely remain the same. Because of the routine extension of time of thirty days to respond to the complaint, most cases will not be eligible for mediation for sixty to seventy-five days after a complaint is filed.

6. *Objection to Submission to Mediation.*—After a case is submitted to mediation, a party has fifteen days pursuant to Rule 2.2 to file a written objection.⁵⁴ Rule 2.2 lists the following factors for the court to consider in determining whether the case should be mediated:

[T]he willingness of the parties to mutually resolve their dispute, the ability of the parties to participate in the mediation process, the need for discovery and extent to which it has been conducted, [and] any other factors which affect the potential for fair resolution of the dispute through the mediation process.⁵⁵

Because Rule 2.1 requires the parties and their representatives to “mediate in good faith,”⁵⁶ the first factor, i.e., the willingness of the parties, should have little practical effect. Parties who are reluctant to mediate should not be excused simply because of their recalcitrance. On the other hand, the parties’ willingness to mediate could present problems in cases such as child custody disputes.⁵⁷ This factor, however, could have been intended to allow the trial court to recognize certain characteristics which might indicate that mediation would not be fruitful.

Rule 1.7 provides that the ADR process can be terminated by the trial court for good cause.⁵⁸ Rule 2.7(D) provides that a mediator can

52. IND. A.D.R. RULE 2.2.

53. *Id.*

54. *Id.*

55. *Id.*

56. IND. A.D.R. RULE 2.1.

57. Janet E. Mitchell, Presentation of Indiana’s New Mediation Rule and Procedures at the Indiana Continuing Legal Education Forum (Nov. 22-26, 1991) (ICLEF) [hereinafter Mitchell, ICLEF Materials] (available in ICLEF office).

58. IND. A.D.R. RULE 1.7.

terminate mediation “whenever the ability or willingness of any party to participate meaningfully in mediation is so lacking that a reasonable agreement is unlikely.”⁵⁹ That Rule further provides that parties cannot unilaterally terminate mediation until after two mediation sessions have been completed.⁶⁰ Reading Rules 1.7, 2.7, and 2.2 together leads to the conclusion that a party’s lack of willingness to resolve a dispute could be the basis to sustain an objection to the original submission of a case to mediation, to terminate mediations at any stage of the proceeding under Rule 1.7 for “good cause shown,” to terminate mediation under Rule 2.7(D) by the mediator, or to serve as the party’s reason to terminate mediation after two sessions under Rule 2.7(D). Thus, the ADR Court Rules attempt to strike a balance between requiring parties to approach mediation with an open mind and realizing, pragmatically, that some cases are simply not likely to benefit from mediation.

As indicated above, after a case has been submitted to mediation, a party may file a written objection if the facts and circumstances of the particular case are such that mediation would not be fruitful. For example, in long-standing disputes, where the parties have negotiated and bargained but have reached an impasse or factual disagreement, Rule 2.2 would allow a party to file a written objection to mediation. The party would set forth the history, the attempts to settle the dispute, and the conclusion that further good faith negotiations would not be fruitful.

Second, Rule 2.2 directs the court to consider the ability of the parties to participate in the mediation.⁶¹ This implies that physical or mental abilities, such as a severe handicap or injury, could serve as the basis for denying a motion for mediation. Rule 2.1 requires the parties to mediate in good faith and Rule 2.7(B) requires that parties *and* their attorneys shall be present at mediation sessions.⁶² These provisions codify the general purpose of mediation that the mediator is to *assist* the *parties* in reaching an agreement.⁶³ This premise is also reflected in the description of Alternative Dispute Resolution Methods which characterizes mediation as a nonadversarial process, the objective of which is to help the *parties* reach an agreement.⁶⁴ Further, decisionmaking authority rests with the *parties*.⁶⁵ Read together, these provisions indicate that the parties are the central players in mediation, not the attorneys. If one of the parties,

59. IND. A.D.R. RULE 2.7(D).

60. *Id.*

61. IND. A.D.R. RULE 2.2.

62. IND. A.D.R. RULE 2.1, 2.7(B).

63. IND. A.D.R. RULE 2.1.

64. IND. A.D.R. RULE 1.3(A).

65. *Id.*

for some reason, is unable to participate in mediation in a meaningful way, an objection to submission to mediation could be made.

Although physical and mental disabilities of a party could be relevant in determining whether a case should be mediated, a party's financial ability to pay for mediation was probably not intended to be a factor under Rule 2.2. A party's indigency could be addressed either by the trial court during mediation⁶⁶ or by other statutes or procedures providing assistance in such cases.

Moreover, Rule 2.2 is a catch-all category, directing the court to consider "any other factors which affect the potential for fair resolution of the dispute through the mediation process."⁶⁷ Some commentators have observed that this provision could address concerns regarding the relative powers or postures of the parties.⁶⁸ In the case of spousal abuse, for example, it may not be reasonable to expect parties to be able to negotiate and mediate on an equal basis.

7. *Discovery*.—The third factor for the court to consider in Rule 2.2 is the need for discovery and the extent to which it has been conducted.⁶⁹ This factor, not found in the Final Draft, was added by the Supreme Court of Indiana. Rule 2.2 provisions must be read in conjunction with Rule 2.10 which provides as follows: "*Discovery*. Whenever possible, parties are encouraged to limit discovery to the development of information necessary to facilitate the mediation process. Upon agreement by the parties or as ordered by the court, discovery may be deferred during mediation."⁷⁰ Taken as a whole, it appears that the Supreme Court of Indiana intended to *restrict* discovery during mediation. Although discovery is limited, general discovery is *not automatically* stayed or tolled during mediation.⁷¹

Discovery is one factor the court must consider when selecting cases for mediation. This probably reflects the supreme court's recognition that some cases will be inappropriate for mediation, either because general discovery needs to be done or because substantial discovery is already underway. For example, extensive discovery may be necessary at the onset of a case because evidence could be lost or because witnesses would otherwise be unavailable. In those cases, the trial court might either decline to submit that case to mediation initially or (pursuant to Rule 2.2) grant an objection to the submission.

66. IND. A.D.R. RULE 2.6. The court may allocate costs between the parties based on an hourly mediation rate.

67. IND. A.D.R. RULE 2.2.

68. Mitchell, ICLEF Materials, *supra* note 57, at 5.

69. IND. A.D.R. RULE 2.2.

70. IND. A.D.R. RULE 2.10.

71. Pursuant to Rule 2.10, discovery can be deferred during mediation by agreement of the parties or by order of the court.

8. *Selection of Mediators.*—The ADR Court Rules provide that all persons who wish to serve as mediators *must* file an application with the trial court.⁷² Applicants must list their qualifications and indicate the type of cases which they wish to mediate.⁷³ Trial judges, or someone delegated by them, must examine applications, determine which applicants meet the requirements of Rule 2.5, and maintain listings of approved mediators.⁷⁴

Mediators may be selected in one of three manners, pursuant to Rule 2.4.⁷⁵ First, the parties may select a mediator from the court's approved listing. Second, a mediator can be selected from an approved listing from another court within the state. Third, the parties can select a nonlisted mediator. However, mediators who are not listed by a court within the state must meet the requirements of Rule 2.5 and must be approved by the trial court prior to selection.

If the parties do not agree upon a mediator within fifteen days of referral to mediation, the trial court shall designate three mediators from its approved list and the parties shall alternately strike names.⁷⁶ The mediator so selected may decline to serve for any reason.⁷⁷ Presumably, the court would then designate a second panel of three mediators and the parties would strike a second time. Because there are no time limits for the parties to strike, the selection process could be unreasonably drawn out.

Assume, for example, that the parties report to the court on the fifteenth day after submission that they cannot agree on the selection of a mediator. The court then takes five days to name a panel and the parties take ten days to strike. If a mediator does not accept the selection, the process starts again. Thirty to forty-five days could elapse before the mediator is even selected.

The potential for delay can be alleviated if trial courts institute strict and effective controls on the selection process. The Rules do not prohibit, for example, reasonable time limits for the striking procedure. Moreover, the courts are not prohibited from naming a panel immediately upon submission and ordering that the parties consider that panel *and* attempt to agree on a mediator within the same fifteen day period following submission.

9. *Qualifications of Mediators.*—To serve as a mediator, a person must complete forty hours (thirty hours in 1992) of mediator training

72. IND. A.D.R. RULE 2.3.

73. *Id.*

74. *Id.*

75. IND. A.D.R. RULE 2.4.

76. *Id.*

77. *Id.*

in courses certified by the Indiana Commission For Continuing Legal Education.⁷⁸ Rule 2.5(A)(2) further provides that persons must also "have received a minimum of five hours (5) of mediation training during the two year period prior to re-application."⁷⁹ The reference to re-application relates to Rule 2.3 which provides that all mediators must reapply every five years in order to maintain listing with the trial court.⁸⁰ To reapply, mediators must complete five additional hours of mediation training within the last two years of each five year period.⁸¹

The Supreme Court of Indiana substantially changed Rule 2.5. The Final Draft provided for thirty hours of training, and the trial court was charged with approving the training.⁸² The proposed rule also provided that mediators could meet the requirements by having ten hours of training in 1991, 1992, and 1993.⁸³

In addition to the training requirements, a mediator must not be interested in the outcome of the litigation, must not be employed by or related to the parties or attorneys, and may not be a full-time judge.⁸⁴ In civil cases, unless the court approves and the parties agree otherwise, a mediator must be an attorney in good standing.⁸⁵ In domestic relations matters, unless the parties agree otherwise and the court approves, a mediator must be either an attorney admitted to practice in Indiana or a person holding a "bachelor's degree from an accredited institution of higher learning."⁸⁶ Any mediator selected must have, to the extent practicable, knowledge of domestic relations policies, practices, and procedures, as well as a working knowledge of Indiana's judicial system.⁸⁷

If Indiana's experience is similar to that of other states, standards or codes of ethics for mediators probably will be developed in the near future. For example, Florida has had court-annexed mediators since 1988 and has pending proposed standards of professional conduct for mediators and separate proposed rules of discipline for mediators.⁸⁸ Several

78. IND. A.D.R. RULE 2.5(A)(2).

79. *Id.*

80. IND. A.D.R. RULE 2.3.

81. IND. A.D.R. RULE 2.5(A)(2).

82. Final Draft, *supra* note 23, Rule 2.5(A)(1).

83. *Id.*

84. IND. A.D.R. RULE 2.5(A)(1).

85. IND. A.D.R. RULE 2.5(B)(1). "Good standing" is determined by the Supreme Court of Indiana.

86. IND. A.D.R. RULE 2.5(C)(1). The court may also approve a mediator selected by the parties who is a non-attorney, a person who does not hold a bachelor's degree, or a person who has not met the training requirements of Rule 2.5.

87. IND. A.D.R. RULE 2.5(C)(2).

88. Florida Mediator/Arbitration Programs: A Compendium, Proposed Florida Standards of Professional Conduct for Certified and Court-Appointed Mediators app. D

professional organizations, such as the Society of Professionals in Dispute Resolution, have developed standards for member mediators. Also, the Family Law Section of the American Bar Association has adopted ethical standards for mediators. National and uniform standards for mediators may soon be available. Talbot D'Alemberte, President of the ABA, has directed the ABA Standing Committee on Dispute Resolution, in cooperation with the American Arbitration Association, to begin the process necessary to promulgate standards of conduct for civil mediators.⁸⁹

10. *Mediation Costs*.—Mediators are to be paid by the parties.⁹⁰ If the parties select a mediator who is not on the court's approved list, they may agree on the hourly rate the mediator is to receive.⁹¹ If a mediator on the court's approved list is selected, the ADR Court Rules are not clear whether the mediator can charge (and the parties agree to pay) an hourly rate higher than the court would set absent an agreement. Presumably, any time a mediator is selected by agreement before the striking process, the parties and the mediator can agree upon a higher hourly rate. Forms prepared by the ISBA ADR Committee, although not adopted by the Supreme Court of Indiana, are evidence that the Committee considers such agreements to be appropriate. Paragraph six of the "Agreement For Mediation" form states that the "mediator selected (has) (has not yet) agreed to serve and the parties (have) (have not yet) agreed to the mediator's fee."⁹²

The proposed forms contemplate that each mediator will have his own fee schedule and that the court's duty will be to determine how the fee is to be paid. The difference in mediation fees between mediators chosen by agreement of the parties and mediators selected after the striking process is also an issue in Florida.

The Rules [Florida's] now permit the parties to choose their own mediator (even one who does not meet the certification requirements of the rules) if they do so within ten days of the order of referral. This provides a mediator with an opportunity

(July 1991) [hereinafter Florida Standards of Professional Conduct for Mediators]; Proposed Rules of Discipline for Certified and Court-Appointed Mediators (July 1991) [hereinafter Florida Rules of Discipline for Mediators] (available from the Florida Dispute Resolution Center).

89. Letter from Talbot D'Alemberte, President of the American Bar Association, to Robert Coulson, President of the American Arbitration Association (Sept. 10, 1991) (on file with the author).

90. IND. A.D.R. RULE 2.6.

91. *Id.*

92. Proposed Amendments to Local Rules: Domestic Relations Mediations submitted by ISBA ADR Committee with Final Draft, Form: Agreement for Mediation (not adopted by the Indiana Supreme Court).

to negotiate a rate of pay higher than the rate usually set by the court, or, conversely, it gives the parties an opportunity to find a mediator who will accept a lower rate.⁹³

The Florida Dispute Resolution Center has found that attorneys are now seeking to have the court appoint popular mediators so that the lower court-set hourly rates apply.⁹⁴

Local courts will need to address this issue so that abuses do not occur. Individual mediators must also be cognizant of the appearance of impropriety which could present itself by accepting the court-set hourly rate for some cases, but charging a higher hourly rate when the employment is the result of an agreement between parties. A difference in fees may present a problem unless there are corresponding differences in other factors of the cases. The above-mentioned proposed Florida Standards of Professional Conduct require that the mediator occupy a position of trust, endeavoring to keep the total charges reasonable and consistent with the nature of the case.⁹⁵

The comments to Rule 2.2 of the Model Rules of Professional Conduct indicate that the Rule does not apply to lawyers acting as mediators.⁹⁶ Whether other Model Rules of Professional Conduct apply to lawyers acting as mediators is not as clear. Therefore, lawyer-mediators should be aware of the Rules of Professional Conduct which indicate that fees shall be "reasonable" and that lawyers should consider eight factors in setting the fee.⁹⁷

ADR Court Rule 2.6 also provides that the court shall "determine the division of such costs by the parties."⁹⁸ This should allow the court to divide the costs between the parties on a percentage basis, but there are no criteria in the Rules to guide the court.

11. *Mediation Procedure, Disclosure Requirements.*—Rule 2.7 mandates that mediators provide certain information and make certain disclosures to parties.⁹⁹ Some of the information required by Rule 2.7, by its nature, must be imparted in advance of any mediation session. The Rules provide, for example, that the mediator shall inform the parties ten days in advance of the time, date, and place of any mediation session and "advise the parties of all persons whose presence at mediation

93. James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA ST. U.L. REV. 47, 58 (1991) (footnote omitted).

94. *Id.*

95. Florida Standards of Professional Conduct for Mediators, *supra* note 88, at VII.A.

96. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1989).

97. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.5(a)(1)-(8) (1989).

98. IND. A.D.R. RULE 2.6.

99. IND. A.D.R. RULE 2.7.

might facilitate settlement.”¹⁰⁰ On the other hand, some disclosures are made *after* the mediation session or sessions. Rule 2.7(A)(6) requires that the mediator disclose any documentation released during the mediation if, at the end of the mediation process, the disclosure is agreed to by both parties.¹⁰¹ The remainder of the eleven requirements, such as the duty to inform the parties as to the anticipated cost of mediation, would seem to be appropriately disclosed *either* before the mediation session or at the beginning of the session.

The confusion over *when* the disclosure required by Rule 2.7 must be made increases upon an examination of the First Draft. Rule 3.6 of those rules was worded differently than the current Rule 2.7. The draft provided the following: “*Duties of Mediator*. In a prompt fashion, the mediator will meet with the parties in the litigation and attempt to reach settlement of issues.”¹⁰² The context of the original ten requirements in the First Draft suggests that the ISBA ADR Committee intended that the disclosures be made at the outset of the mediation session. The inclusion of the requirement concerning the disclosure of documentation during the session, however, creates an inherent inconsistency. A general conclusion can be reached concerning Rule 2.7 that all the information and disclosures must be imparted, but not necessarily at the same time. Some can be imparted before the session, some during, and some after.

Rule 2.7(B)(1) provides, “The parties and their attorneys shall be present at any mediation session unless otherwise agreed. At the discretion of the mediator, non-parties to the dispute may also be present.”¹⁰³ This subparagraph is inconsistent with subparagraph (2) which provides, “All parties, attorneys with settlement authority, representatives with settlement authority, and other necessary individuals shall be present at each mediation conference to facilitate settlement of a dispute unless excused by the court.”¹⁰⁴ The confusion between these two subparagraphs results from changes made by the Supreme Court of Indiana in Rule 2.7(B) of the Final Draft. The provisions of Rule 2.7(B)(1) and (2) of the Final Draft provided:

Mediation Conferences.

(1) The mediator and the parties shall determine those persons whose presence at a particular mediation session will be beneficial to the resolution of a dispute. At the discretion of the mediator, non-parties to the dispute or attorneys may be present during

100. IND. A.D.R. RULE 2.7(A)(9), (10).

101. IND. A.D.R. RULE 2.7(A)(6).

102. First Draft, *supra* note 7, Rule 3.6.

103. IND. A.D.R. RULE 2.7(B)(1).

104. IND. A.D.R. RULE 2.7(B)(2).

the course of the interview or may be present during the course of the session.

(2) A court may order all parties, attorneys with settlement authority, representatives with settlement authority, and other necessary individuals to meet at a mediation conference to facilitate settlement of a dispute.¹⁰⁵

Based upon these differences, it appears that the Indiana Supreme Court wanted to change the Final Draft and to make the presence of parties and attorneys mandatory. Reading the two versions of Rule 2.7 together, one can conclude that the supreme court intended to mandate the presence of both attorneys and clients in all sessions. It is not as clear, however, that the supreme court *intended* to mandate persons with settlement authority (insurance company representatives, for example) to be *physically present* at all sessions.¹⁰⁶ Until this apparent confusion is addressed, Rule 2.7 must be interpreted as requiring attendance of all parties, counsel, and those with settlement authority at all sessions.¹⁰⁷ On a final, more definitive note, Rule 2.7(B)(4) provides that mediation sessions are not open to the public.¹⁰⁸

12. *Confidential Statement of Case.*—In civil cases, attorneys *may* submit a confidential statement of the case *prior* to the mediation conference pursuant to Rule 2.7(C).¹⁰⁹ The Rule neither mandates a written statement nor states how far in advance of the hearing a statement must be filed. Presumably, it could be filed on the day of the conference, but the advantage of educating the mediator prior to the conference would obviously be lost. If, however, the statement is supplemented by damage brochures, videos, and other exhibits, such evidence must be made available to opposing counsel at least five days prior to the mediation session.¹¹⁰ Although Rule 1.9 provides that papers and pleadings used during mediation must be served pursuant to Indiana Trial Rule 5, the written case statements are excepted from this service requirement.

Second, Rule 2.7 contains an important statement of general philosophy concerning the role of mediators. The Rule provides that the written statement *shall* include the legal and factual contentions of the parties, the factors considered in arriving at the current settlement posture,

105. Final Draft, *supra* note 23, Rule 2.5(B)(1), (2).

106. It may be possible for the representatives with settlement authority to be present by telephone.

107. One commentator, a member of the ISBA ADR Committee, wrote that Rule 2.7(B)(2) was intended to apply solely to civil cases, rather than to domestic relations cases. Mitchell, ICLEF Materials, *supra* note 57.

108. IND. A.D.R. RULE 2.7(B)(4).

109. IND. A.D.R. RULE 2.7(C)(3).

110. *Id.*

and the status of the settlement.¹¹¹ Rule 2.7(C) contains the following provision:

In the mediation process, the mediator may meet jointly or separately with the parties and may express an evaluation of the case to one or more of the parties or their representatives. This evaluation may be expressed in the form of settlement ranges rather than exact amounts. The mediator may share revealed settlement authority with other parties or their representatives.¹¹²

This provision suggests that mediators refrain from expressing direct personal opinions on the value of a case.¹¹³

Third, Rule 2.7 (C) requires that the Statement of Case be returned to the submitting parties or attorneys if the mediation process does not result in settlement.¹¹⁴

13. Completion/Termination of Mediation.—The First Draft provided that mediators were required to report to the court within forty-five days from appointment that the case had been completed or terminated.¹¹⁵ This forty-five day requirement was apparently to function as a time limit on the duration of mediation. The limit, however, was eliminated in the Final Draft and the ADR Court Rules. Rule 2.7(D) provides, “As soon thereafter as practicable, the mediator shall report to the court that the mediation process has been completed, terminated, or extended.”¹¹⁶ The word “extended” was added when the forty-five day extension was deleted. It is not clear to what the term “thereafter” refers, but it probably means as soon as practicable after the mediation conference.

A mediator has the discretion to terminate the mediation process if he believes that the process is harming or prejudicing one of the parties or any children involved.¹¹⁷ A mediator can also terminate mediation if one or more of the parties is so unwilling to participate meaningfully in mediation that a reasonable agreement is unlikely.¹¹⁸ This provision raises the question of whether the mediator can, or should, participate

111. IND. A.D.R. RULE 2.7(C)(1)-(3).

112. IND. A.D.R. RULE 2.7(C)(3).

113. Florida has found that some mediators are aggressive and direct in their attempts to force agreements and will use the weight of their position or experience to “bash” the parties, stating their personal opinion as to the value of the case. Alfini, *supra* note 93, at 68-71.

114. IND. A.D.R. RULE 2.7(C)(3).

115. First Draft, *supra* note 7.

116. IND. A.D.R. RULE 2.7(D).

117. *Id.*

118. *Id.*

(or testify in) any sanction proceeding brought pursuant to Rule 2.11. The Rules answer this question in the negative.

The mediator is not to be involved in any sanction proceeding. Rule 2.7(D) provides that even if the mediator terminates the process because a party is unwilling to mediate in good faith, the mediator may not state the reason in the report to the court.¹¹⁹ A mediator may state that mediation was terminated “due to conflict of interest or bias on the part of the mediator.”¹²⁰

Further, Rule 2.12 provides, “Mediators shall not be subject to process requiring the disclosure on *any* matter discussed during the mediation, but rather, such matters shall be considered confidential and privileged in nature.”¹²¹ Confidentiality *cannot* be waived by the parties and *can* be raised via an objection to obtaining evidence from mediation, either by the mediator or by any party.¹²² Rule 2.7(D) also provides that the parties must attend at least two sessions before terminating mediation.¹²³

14. *Report of Agreement.*—Pursuant to Rule 2.7(E)(1), if no agreement is reached, the mediator must report that fact to the court without comment.¹²⁴ If an agreement *is* reached, the agreement *must* be reduced to writing and *filed* with the court.¹²⁵ If the agreement disposes of all issues, it shall be accompanied by a “joint stipulation of disposition.”¹²⁶ Disposition is not defined and is not necessarily equivalent to a joint stipulation of dismissal. The agreement reached might contemplate that the lawsuit remain active while some action is taken or some other issues resolved. The uncertainty created by this process and the potential confusion between “disposition” versus “dismissal” and “joint stipulation” versus “judgment,” can be avoided in most cases by the parties submitting the agreement in the form of an agreed judgment.

The agreement, however, is, if not a formal settlement agreement, a binding agreement to settle. Rule 2.7(E)(3) clearly indicates that upon filing with the court, the agreement becomes a court *order*, but not a final judgment.¹²⁷ The order means that the parties will perform as agreed. If there is a failure to perform or a breach of the agreement, the court can impose sanctions, including the “entry of judgment on

119. *Id.*

120. *Id.*

121. IND. A.D.R. RULE 2.12 (emphasis added).

122. IND. A.D.R. RULE 2.12.

123. IND. A.D.R. RULE 2.7(D).

124. IND. A.D.R. RULE 2.7(E)(1).

125. *Id.*

126. *Id.*

127. IND. A.D.R. RULE 2.7(E)(3).

the agreement.”¹²⁸ Rule 2.7(E)(2) and (3) also allows the court to impose appropriate remedies if a party fails to perform the settlement agreement.¹²⁹ Such remedies could presumably include orders of specific performance, injunctive relief, or other such equitable relief.

15. *Subsequent Involvement of Mediators.*—The role of the mediator in subsequent associations with the mediating parties is unclear. Because the Supreme Court of Indiana changed Rule 2.8 from its proposed format, an inconsistency between the first two sentences of Rule 2.8 developed. The current rule provides:

A person who has served as a mediator in a proceeding may act as a mediator in subsequent disputes between the parties, and the parties may provide for a review of the agreement with this mediator on a periodic basis. However, the mediator shall decline to act in any capacity unless the subsequent association is clearly distinct from the mediation issues.¹³⁰

The first sentence states that a mediator may participate as *mediator* in a *subsequent* dispute between the parties on issues related to the first mediation. The second sentence, however, restricts subsequent participation (even as a mediator) to disputes which are clearly *distinct* from the original re-evaluation issues. This conflict was apparently created by a change made by the Indiana Supreme Court. The Final Draft of Rule 2.8 had the same first sentence as the final Rule but the second sentence in the Final Draft provided that “the mediator shall decline to act as *attorney, counselor or psychotherapist* for either party during or after the mediation process unless the subsequent representation, counseling, or treatment is clearly distinct from the mediation issues.”¹³¹ By deleting the words “attorney, counselor, or psychotherapist” and inserting instead “any capacity” (which obviously includes the capacity as mediator), the Supreme Court of Indiana created confusion. Presumably the confusion will be addressed.

16. *Evidence.*—Rule 2.9 provides that, except for privileged communications, the rules of evidence do not apply in the mediation session.¹³² It is recommended that damages should be supported by documentary evidence, such as medical bills, checks, and related documents.¹³³

17. *Sanctions.*—Sanctions for failure to comply with the mediation rules are limited to “the assessment of mediation costs and/or attorney

128. IND. A.D.R. RULE 2.7(E)(3).

129. IND. A.D.R. RULE 2.7(E)(2), (3).

130. IND. A.D.R. RULE 2.8.

131. Final Draft, *supra* note 23, Rule 2.8 (emphasis added).

132. IND. A.D.R. RULE 2.9.

133. *Id.*

fees relevant to the [mediation] process.”¹³⁴ This limitation language resulted, as previously indicated in Part I, from the reluctance of certain special interest groups to accept the attorney’s fees penalties provided in the First Draft. This limitation, however, must be read in conjunction with Rule 2.7(E)(3) which provides much broader sanctions for failure to comply with settlement agreements.¹³⁵

18. *Confidentiality*.—Mediation is to be regarded as settlement negotiations for evidentiary purposes. Rule 2.12 states that offering to pay or accept any settlement sum is inadmissible evidence for the purpose of proving liability for or invalidity of a claim or its amount.¹³⁶ Evidence of *conduct* or *statements* made during mediation is likewise inadmissible.¹³⁷ The Rule, however, does not seem literally to prohibit evidence of what the parties *said* in mediation concerning what the agreement was, or what the intent of the parties was, in the event of a dispute as to the performance or nonperformance of a settlement agreement.

Further, Rule 2.12 states that evidence “otherwise discoverable” may still be offered at trial even if it was presented in the course of the mediation process.¹³⁸ If, for example, the plaintiff admits in mediation that he told the police officer that he ran a red light, the defendant is not prohibited (by Rule 2.12) from calling the police officer to testify as to that statement. A closer question is presented if, in a deposition subsequent to the mediation, the plaintiff is asked whether he told the police officer the light was red. Does the plaintiff have to answer the question? Can the plaintiff refuse to answer on the grounds that the comment was privileged? Probably, the answer is that the plaintiff has to answer, but if he answers differently than at mediation, no mention nor any use of the previous statements made in mediation can be made. Again, if there is evidence independent from the statements in mediation, that independent evidence can be used.

Evidence of what was done or said in a mediation session could be admissible if the evidence is offered “for another purpose, *such as* proving bias or prejudice of a witness, [or] negating a contention of undue delay.”¹³⁹ For example, a statement of a plaintiff in mediation promising one-half of any potential recovery to a sister could be used at trial, if the sister testifies, to show the bias or prejudice of the sister. The Rule is not clear whether this would apply to issues of bias and prejudice by the plaintiff.

134. IND. A.D.R. RULE 2.11.

135. IND. A.D.R. RULE 2.7(E)(3).

136. IND. A.D.R. RULE 2.12.

137. *Id.*

138. *Id.*

139. IND. A.D.R. RULE 2.12 (emphasis added).

Conduct of a party during mediation sessions is admissible in connection with issues of "undue delay."¹⁴⁰ Although this provision is unclear, it probably refers to claims for sanctions (under Rule 2.7(E)(3) or 2.11) for parties who unduly delay the mediation or general litigation process.

III. CONCLUSION

The language of Indiana's court-annexed mediation is unique. The substance of the ADR Court Rules is similar to rules which have been placed in effect in some states or proposed in others. The interpretation and application of the ADR Court Rules by the Bench and Bar in Indiana should ultimately be guided by the general underlying theme of the Rules: the intervention of a neutral party in the trial process can result in earlier and less costly settlements.

140. *Id.*

Bankruptcy in the Seventh Circuit: 1991

DOUGLASS G. BSHKOFF*

During the period covered by this survey,¹ the Seventh Circuit decided more than fifty bankruptcy appeals. I have included only opinions of more than passing interest in this review of the court's work, including one district court opinion which treats matters of particular interest to Indiana bankruptcy practitioners.

I. POWERS OF AVOIDANCE

Two separate provisions of the Bankruptcy Code authorize avoidance of fraudulent transfers. Section 544(b) vests the trustee with rights created by state law in favor of creditors holding unsecured claims.² Section 548 is a federal fraudulent conveyance statute which is only available to the bankruptcy trustee.³ In *Jones v. Atchison*,⁴ the Seventh Circuit held that a debtor's pre-bankruptcy renunciation of a testamentary gift cannot be set aside under section 548.⁵ Neither the trial judge nor the appellate court addressed the merits. Arguably, renunciation by an insolvent heir is a fraud on creditors.⁶ Each court in the *Atchison* case decided, however, that the relation back effect of the disclaimer retroactively eliminated the transfer and eliminated any need to discuss possible prejudice to creditors.⁷

The renunciation in *Atchison* occurred less than three months before the debtor's bankruptcy and was initially challenged under both section 544(b) and section 548. The bankruptcy judge decided that state law failed to create any cause of action which could be passed along to the trustee via section 544(b).⁸ This interpretation of state law was clearly

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1. See Douglass G. Boshkoff, *Bankruptcy in the Seventh Circuit: 1989-1990*, 24 IND. L. REV. 551 (1991) (covering a period which concluded on August 31, 1990). This survey covers cases decided during the balance of 1990 and all of 1991. Cases decided during 1991 are included only if the opinions appeared in the West advance sheets on or before December 30, 1991 (947 F.2d No. 3).

2. 11 U.S.C. § 544(b) (1988).

3. 11 U.S.C. § 548 (1988 & Supp. II 1990).

4. *In re Atchison*, 925 F.2d 209 (7th Cir.), cert. denied, 112 S. Ct. 178 (1991).

5. *Id.* at 212.

6. See Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 610-26 (1989).

7. *Atchison*, 925 F.2d at 211-12.

8. *Jones v. Atchison (In re Atchison)*, 101 B.R. 556, 557 (Bankr. S.D. Ill. 1989).

correct. The Illinois Probate Act does not allow creditors of a disclaiming party to challenge the renunciation absent special circumstances not present in the facts of this case.⁹ This part of the lower court's ruling was not challenged on appeal.¹⁰ Only the section 548 claim came before the Seventh Circuit.

In affirming the decision of the bankruptcy court, Judge Will offered an unsatisfactory justification for dismissing the challenge based solely upon federal law. He reasoned that because a *valid* disclaimer had the effect of preventing the debtor from acquiring any interest in the disclaimed property, the debtor never had any interest in property which could be the subject of a transfer.¹¹ After the disclaimer, no transfer had occurred because there was nothing to transfer. Thus, there was nothing which could be avoided under section 548. Such circular reasoning is often encountered in litigation involving disclaimers of testamentary gifts.¹² The retroactive effect of a disclaimer is offered as the justification for concluding that no transfer exists. Once one assumes that no transfer exists, the validity of the disclaimer which produces the retroactive effect is assumed and cannot be debated.

Judge Will reasoned that Illinois law controlled the interpretation of section 548. Relying on *Butner v. United States*¹³ he observed, "Absent a federal provision to the contrary, a debtor's interest in property is determined by applicable state law."¹⁴ No one doubts that Illinois is free to fashion its laws of testate and intestate succession in a way that prejudices the interests of the disclaimant's creditors, but the Illinois choice is not necessarily one which should control the interpretation of section 548. A line of cases beginning with *Durrett v. Washington National Insurance Co.*¹⁵ has held that section 548, as federal law, can be used to avoid a transfer which is beyond the reach of nonbankruptcy fraudulent conveyance law. The Seventh Circuit has endorsed the general principle announced in *Durrett*.¹⁶ Thus, the exercise of a power of disclaimer could be viewed as a transfer under section 101(50)¹⁷ of the

9. *Id.*

10. *In re Atchison*, 925 F.2d 209, 210 n.2 (7th Cir.), *cert. denied*, 112 S. Ct. 178 (1991).

11. *Id.* at 211.

12. See Hirsch, *supra* note 6, at 593-95, 601.

13. 440 U.S. 48 (1979).

14. *Atchison*, 925 F.2d at 210.

15. 621 F.2d 201 (5th Cir. 1980).

16. *Bundles v. Baker (In re Bundles)*, 856 F.2d 815, 822-23 (7th Cir. 1988) (mortgage foreclosure in compliance with state law may be avoided under § 548). This and similar applications of § 548 are criticized in THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 148-50 (1986).

17. 11 U.S.C. § 101(50) (Supp. II 1990).

Code, regardless of the Illinois view. The appropriate relationship between the law of testate and intestate succession and the law of fraudulent conveyances is not well articulated in judicial decisions. There are good arguments for both favoring and opposing the application of fraudulent transfer concepts to testamentary disclaimers.¹⁸ This problem deserved a more extensive and thoughtful consideration than was received in the *Atchison* opinion.¹⁹

Finally, and this may be the most disturbing aspect of this case, the Seventh Circuit failed to acknowledge and discuss cases, including one bankruptcy decision from the Central District of Illinois,²⁰ which conclude that post-petition disclaimers of inheritance violate section 549.²¹ If the relation back doctrine fails to negate the existence of a transfer when section 549 is invoked, why not apply the same analysis to pre-petition disclaimers? Further confusing the situation is the fact that in another disclaimer case, out of the Southern District of Illinois, the trustee was successful in avoiding a disclaimer under section 549.²² *Atchison* is cited and distinguished.²³ Sooner or later, the Seventh Circuit will be forced to clarify its position on disclaimers.

II. CLAIMS

Equitable considerations continue to play a prominent role in the Seventh Circuit's disposition of claim disputes.²⁴ This year the court, in

18. See Hirsch, *supra* note 6, at 610-26.

19. Two cases condemning prebankruptcy disclaimers were dismissed in one sentence in *Atchison*: "Cases cited by the trustee to the contrary are unpersuasive because they fail to give full application to the relation back doctrine under applicable state laws." *In re Atchison*, 925 F.2d 209, 211 (7th Cir.), *cert. denied*, 112 S. Ct. 178 (1991).

20. *Geekie V. Watson (In re Watson)*, 65 B.R. 9, 12 (Bankr. C.D. Ill. 1986).

21. *Cornelius v. Cornell (In re Cornell)*, 95 B.R. 219, 222 (Bankr. W.D. Okla. 1989); *McGraw v. Betz (In re Betz)*, 84 B.R. 470, 472 (Bankr. N.D. Ohio 1987); *Flanigan v. Lewis (In re Lewis)*, 45 B.R. 27, 30 (Bankr. W.D. Mo. 1984).

22. *Williams v. Chenoweth (In re Chenoweth)*, 132 B.R. 161, 166 (Bankr. S.D. Ill. 1991).

23. *Id.* at 164. Judge Meyers, who decided *Chenoweth*, also wrote the lower court opinion in *Atchison*. In *Chenoweth*, he relied on the reasoning contained in his opinion in *Atchison* to justify a different result when the disclaimer occurs post-petition. "The 'entitled to acquire' language of § 541(a)(5)(A) results in a much broader definition of property of the estate for testamentary interests arising after bankruptcy and manifests Congress' intent to capture such interests for . . . the bankruptcy estate. As such § 541(a)(5)(A) overrides the applicable state law of disclaimer. . . ." *Id.* This attempt to articulate a distinction between § 548 litigation and § 549 litigation was unpersuasive when he authored his opinion in *Atchison* and remains so in *Chenoweth*. The relation back theory of the Seventh Circuit involves an interpretation of "transfer" as that term is defined in § 101(50). The term is common to both § 548 and § 549. Judge Meyers's reasoning ignores the *Atchison* rationale that whatever the debtor owned retroactively disappeared when the disclaimer took place.

24. There were three equitable subordination decisions last year. See Boshkoff, *supra* note 1, at 556-60.

In re Unroe,²⁵ relied heavily on section 105 to excuse several mistakes made by the IRS with reference to a tax claim in a Chapter 13 proceeding.²⁶

Unroe's Statement of Affairs and Plan indicated total priority tax debts of \$15,000 for the 1982 and 1983 tax years. However, the IRS's proof of claim, filed before the bar date, covered only 1982 taxes. After the bar date, the IRS filed a second proof of claim for 1985 taxes which it styled as an amendment to the previous claim for 1982 taxes. It made no attempt to obtain an extension of the time for filing as authorized by Bankruptcy Rule 3002(c)(1). Almost one year later, it filed a third proof of claim (the second tardy filing), changing the date in the second proof of claim (the first tardy filing) to 1983. The debtor's objections to the late filed claim were rejected by the bankruptcy court on two grounds either: (1) the late filed claim for 1983 (1985) taxes related back to the timely proof of claim for 1982 taxes pursuant to Federal Rule of Civil Procedure 15(c)²⁷ or (2) the bankruptcy court was vested with an equitable power to accept the late claim.²⁸

Partially agreeing with this reasoning, the Seventh Circuit affirmed.²⁹ It first rejected the relation back justification. Federal Rule of Civil Procedure 15(c) was not adequate to rescue the late claim because there was no nexus between the two claims.³⁰ "Separate years imply separate tax claims. . . ."³¹ Nonetheless, the bankruptcy court's acceptance of the late claim was an appropriate exercise of the equitable power conferred by section 105.³²

25. 937 F.2d 346 (7th Cir. 1991).

26. *Id.* at 349-50.

27. FED. R. CIV. P. 15(c) (relation back of amendments) is applicable in adversary proceedings and contested matters. *See* BANK. R. 7015, 9014. A disputed claim is in the latter category. *Unroe*, 937 F.2d at 349.

28. *Unroe*, 937 F.2d at 348.

29. *Id.* at 351.

30. FED. R. CIV. P. 15(c) permits relation back when the amendment relates to the same "conduct, transaction, or occurrence."

31. *In re Unroe*, 937 F.2d 346, 349 (7th Cir. 1991).

32. *Id.* at 349-51. Collier notes two interpretative approaches, narrow and broad, to § 105. 2 WILLIAM M. COLLIER, COLLIER ON BANKRUPTCY ¶ 105.01[3] (Lawrence P. King ed., 15th ed. 1991). *Unroe* clearly fits in the latter category. Collier describes the approaches as follows:

The cases and commentary reflect two general schools of thought regarding the breadth of section 105. The first recognizes that certain goals of the Bankruptcy Code are implied but not stated in the statutory language and views section 105 as granting the bankruptcy courts authority to fill the gaps left by the statutory language. The other approach is that section 105 is not a broad writ, and should be narrowly construed.

Regardless of the view adopted, it should be universally recognized that

This result is somewhat surprising in light of prior Seventh Circuit authority. In *Wilkins v. Simon Brothers, Inc.*,³³ the court refused to excuse a late filing.³⁴ However, the *Unroe* court seized on language in *Wilkins* to justify the result it reached. *Wilkins* had suggested that an exception to the strict enforcement of time limits could be made if the late claim was regarded as an amendment of an earlier and timely informal claim.³⁵ The *Unroe* court reasoned that the timely filed 1982 claim was fair warning of the IRS's intent to present claims covering subsequent tax years and warranted the exercise of equitable discretion.³⁶ This reasoning is rather curious when one remembers that the court had previously found no nexus between the timely and late filings for purposes of relation back under Federal Rule of Civil Procedure 15(c).

Unroe raises more questions than it answers. Consider the following possible lines of inquiry:

1. The IRS claim was allowed even though the agency offered absolutely no explanation for its late filing. The *Wilkins* court, on the other hand, refused to excuse a late filing even though there was a plausible explanation for the delay—a mix-up which occurred during the relocation of the creditor counsel's office.³⁷ Arguably, *Wilkins* presents a more sympathetic case for relief. Are we to assume that the delinquent creditor is better off with silence than an admission of fault? How can a court determine that the delinquent creditor is entitled to equitable relief when it does not understand how the mix-up occurred?

2. Are governmental creditors more likely to benefit from exercise of the bankruptcy court's inherent power than nongovernmental claimants? Possibly. Bankruptcy Rule 3002(c)(1) permits an extension of the time for filing claims by governmental units. Relating that rule to late claims, the *Unroe* court observed that "a bankruptcy court's power to extend the bar date implies a corresponding power to permit late claims."³⁸

3. What is to be made of the *Unroe* court's following observation concerning completely new claims? "We leave for another case the

the power granted to the bankruptcy courts under section 105 is not limitless and should not be employed as a panacea for all ills confronted in the bankruptcy case. Section 105 does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code or mandates of other state and federal statutes.

Id. (footnotes omitted).

33. 731 F.2d 462 (7th Cir. 1984).

34. *Id.* at 464.

35. *Id.* The *Wilkins* case was remanded for further findings as to whether the creditor's conduct was sufficient "to constitute a de facto informal filing." *Id.* at 465.

36. *In re Unroe*, 937 F.2d 346, 350 (7th Cir. 1991).

37. *Wilkins*, 731 F.2d at 464.

38. *Unroe*, 937 F.2d at 350.

question whether a judge in equity could permit an entirely new claim filed out of time. *Wilkins* appears to rule out this possibility, but we have not had the benefit of briefs or argument on the issue."³⁹ This quotation suggests a sympathy with further exercise of the bankruptcy court's power to grant equitable relief. Clearly, the decision in *Unroe* invites tardy claimants to petition for relief from the time constraints contained in Bankruptcy Rule 3002(c).

Unroe is not the only unusual claim decision. The IRS won a second questionable victory in litigation arising out of serial Chapter 11 filings. Two years ago, the Seventh Circuit, in *Fruehauf Corp. v. Jartran, Inc.*,⁴⁰ decided that Chapter 22 bankruptcies⁴¹ were permissible⁴² and then went on to hold that an administrative claim arising during the initial filing did not automatically retain that status in the second Chapter 11 case.⁴³ The court stated, "To receive an administrative priority in *Jartran II*, Fruehauf must demonstrate its claims relative to *Jartran II*; an administrative priority in *Jartran I* does not translate to an administrative priority in *Jartran II*."⁴⁴

The Seventh Circuit, in *In re Official Committee of Unsecured Creditors of White Farm Equipment Co.*,⁴⁵ refused to treat priority tax claims in the same fashion that *Jartran* had treated priority administrative claims. The plan in the initial bankruptcy provided for payment of priority tax claims over a six year period as required by section 1129(a)(9)(c).⁴⁶ When the second Chapter 11 case was filed, the creditor's committee argued that the tax claim was no longer entitled to priority status. Relying on the language of section 1141(d), the committee asserted that the treatment provided in the confirmed plan had been substituted for the original priority claim. The Seventh Circuit disagreed, stating:

By this reasoning, all debts incorporated in the reorganization plan lose their old priority status and are instead transformed into mere contractual obligations. . . . As the Committee concedes, administrative claims are intimately tied to a single bank-

39. *Id.*

40. *In re Jartran, Inc.*, 886 F.2d 859 (7th Cir. 1989).

41. A "Chapter 22" bankruptcy is two successive Chapter 11 proceedings. Recently, the Supreme Court, in *Johnson v. Home State Bank*, 111 S. Ct. 2150, 2156 (1991), refused to prohibit serial filings absent a finding of bad faith. *Johnson* was a Chapter 20 (7 + 13) proceeding.

42. *Jartran*, 886 F.2d at 866-67.

43. *Id.* at 870-71.

44. *Id.* at 870.

45. 943 F.2d 752 (7th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3481 (U.S. Mar. 9, 1992).

46. *Id.* at 754.

ruptcy estate in a manner that is completely different from the trust fund tax claims at issue here. Absent a clear signal from Congress, therefore, we are reluctant to adopt the Committee's broad reading of *Jartran* and extend its holding so far beyond its unique facts.⁴⁷

Perhaps the decision in *White Farm* simply reflects some newly discovered doubts about the wisdom of permitting Chapter 22 cases and is an attempt to restrict the application of the *Jartran* decision. In any event, priority claimants are now in an enviable position, as they may choose either to continue with the treatment provided by the plan or revert to their original status.⁴⁸ Other parties to the confirmed plan are not so fortunate. Absent modification or revocation of the plan, they remain bound to the treatment provided in the original plan of reorganization, even though their affirmative votes may have been influenced by the treatment of the priority claimants.

III. PROCEDURE

Matters of procedure continue to be a major concern of appellate courts. The Seventh Circuit is no exception. Although some procedural wrangling should be expected under even the best of circumstances, bankruptcy procedural disputes often appear to be unnecessary and wasteful. Some of the complexity encountered in bankruptcy litigation can be blamed on congressional unwillingness to create a simple court structure following the decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*⁴⁹ A second complicating factor is the division of adjudicatory responsibility in bankruptcy matters between state and federal forums, a division which long predated *Marathon*.⁵⁰ *Diamond Mortgage Corp. v. Sugar*⁵¹ demonstrates how both these complicating factors can interact in the context of a procedural question often encountered by first year law students: Is the forum entitled to exercise personal jurisdiction over an absent defendant?

47. *Id.* at 757.

48. The *White Farm* court held that the IRS could claim a priority status in the second bankruptcy only if it was still, as an original matter, entitled to priority at that time. *Id.*

49. 458 U.S. 50 (1982) (Section 1471 of the Bankruptcy Act, which grants jurisdiction to bankruptcy judges, violates Article III of the Constitution because judicial power of the United States must be exercised by judges with life tenure and protection against salary diminution.).

50. STEPHEN E. SNYDER & LAWRENCE PONOROFF, COMMERCIAL BANKRUPTCY LITIGATION § 2.01 (1991).

51. 913 F.2d 1233 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 968 (1991).

Diamond Mortgage was a malpractice action brought by a Chapter 11 debtor in possession against its former attorneys. The plaintiff, whose bankruptcy was pending in the Bankruptcy Court for the Northern District of Illinois, commenced this action in the district court for the same district and claimed that personal jurisdiction over the defendants was obtained by service of process in Michigan pursuant to Bankruptcy Rule 7004(d), which authorizes nationwide service of process. The district court accepted the magistrate's recommendation for dismissal of the litigation on the ground that Bankruptcy Rule 7004(d) was not applicable to this controversy.

The Seventh Circuit reversed.⁵² It first decided that the malpractice was related to the bankruptcy because its resolution would affect the pool of assets available for distribution to creditors.⁵³ Having identified a nexus with bankruptcy, the court then decided that the bankruptcy rules, including the provision for nationwide service of process, applied irrespective of the decisionmaker.⁵⁴ Thus, the fact that the malpractice action had not been referred to the bankruptcy judge,⁵⁵ a possible post-*Marathon* disposition, had no effect on the applicability of the bankruptcy rules. This result is quite sensible.

It would seem anomalous to limit nationwide service of process to only those adversary proceedings which are heard in the bankruptcy court. To do so would cause personal jurisdiction to hinge upon whether the district court has withdrawn its reference to the bankruptcy court. Such a limitation would give the plaintiff in an adversary case before a bankruptcy court a more extensive ability to serve defendants than a plaintiff in an identical adversary case before the district court. This result hardly seems justifiable.⁵⁶

It was then necessary to determine whether Bankruptcy Rule 7004(d) is constitutional when applied in a non-core (state law) proceeding to nonresident defendants. Judge Cudahy was satisfied that the minimum contacts test of *International Shoe Co. v. Washington*⁵⁷ was satisfied by

52. *Id.* at 1248.

53. *Id.* at 1239.

54. *Id.* at 1241.

55. See 28 U.S.C. § 157(a) (1988) ("Each district court may provide that . . . any or all proceedings . . . arising in or related to a case under title 11 shall be referred to the bankruptcy judges for district.").

56. *Diamond Mortgage Corp. v. Sugar*, 913 F.2d 1233, 1242 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 968 (1991) (quoting *Stavriotis v. Litwin*, No. 86-C2328, 1986 WL 12005, at *3 (N.D. Ill. Oct. 19, 1986)).

57. 326 U.S. 310 (1945).

the defendants' contacts with the United States, not with Illinois.⁵⁸

We believe . . . that the [defendants'] contacts with the State of Illinois are, for our purposes, simply irrelevant. . . . Since section 1334 provides federal question jurisdiction, the sovereign exercising its authority over the [defendants] is the United States, not the State of Illinois. Hence, whether there exist sufficient minimum contacts between the [defendants] and the State of Illinois has no bearing upon whether the United States may exercise its power . . . pursuant to its federal question jurisdiction. Certainly, the [defendants] have sufficient contacts with the United States to be subject to the district court's *in personam* jurisdiction.⁵⁹

Some commentators have questioned the adequacy of this analysis.⁶⁰ At the same time, one should note that the result in *Diamond Mortgage* is consistent with the approach taken in both the Fourth⁶¹ and Eleventh Circuits.⁶²

The awkwardness of the post-*Marathon* approach to bankruptcy adjudication is also reflected in litigation concerning the right to a jury trial.⁶³ In *N.I.S. Corp. v. Hallahan (In re Hallahan)*,⁶⁴ the debtor temporarily frustrated his former employee's attempt to collect damages for breach of a covenant not to compete by commencing a voluntary bankruptcy and thus obtaining the benefit of the automatic stay. The employer responded by commencing an adversary proceeding before the bankruptcy judge claiming that the damages arising from the wrongful competition were excepted from discharge by section 523(a)(6).⁶⁵ The bankruptcy judge agreed and entered a judgment against the debtor for more than

58. *Diamond Mortgage*, 913 F.2d at 1244.

59. *Id.*

60. Jeffrey T. Ferriell, *The Perils of Nationwide Service of Process in a Bankruptcy Context*, 48 WASH. & LEE L. REV. 1199, 1210-54 (1991); Daniel N. Gregoire, Note, *Fifth Amendment Due Process Limitations on Nationwide Federal Jurisdiction*, 61 B.U. L. REV. 403 (1981); Note, *Bankruptcy and the Limits of Federal Jurisdiction*, 95 HARV. L. REV. 703, 713-20 (1982).

61. *Hogue v. Milodon Eng'g, Inc. (In re Hogue)*, 736 F.2d 989 (4th Cir. 1984).

62. *Nordberg v. Granfinanciera (In re Chase & Sanborn Corp.)*, 835 F.2d 1341 (11th Cir. 1988), *rev'd on other grounds*, 492 U.S. 33 (1989).

63. An extraordinary amount has been written on this subject. A good statement of the current situation can be found in S. Elizabeth Gibson, *Jury Trials and Core Proceedings: The Bankruptcy Judge's Uncertain Authority*, 65 AM. BANKR. L.J. 143, 145-50 (1991). See also SNYDER & PONOROFF, *supra* note 50, ¶ 3.05[1].

64. 936 F.2d 1496 (7th Cir. 1991).

65. 11 U.S.C. § 523(a)(b) (1988) (no discharge "for willful and malicious injury by the debtor to another entity or to the property of another entity").

\$250,000.⁶⁶ On appeal, the debtor unsuccessfully argued that the bankruptcy judge erred in denying his demand for a jury trial. The Seventh Circuit reasoned that there was no constitutional right to a trial by jury.⁶⁷ First, the dischargeability litigation was equitable in nature and, as such, involved no right to a jury trial.⁶⁸ The court then offered a novel alternative justification for the absence of a jury trial:

Even if we were to assume that the dischargeability action was legal in nature, however, Hallahan cannot claim a right to jury trial because, as a Chapter 7 debtor, he voluntarily submitted his case to bankruptcy court. . . . [I]f creditors [by filing claims] . . . thereby [lose] any jury trial right otherwise guaranteed by the Seventh Amendment, debtors who initially choose to invoke the bankruptcy court's jurisdiction to seek protection from their creditors cannot be endowed with any stronger right. A defendant or potential defendant to an action at law cannot initiate bankruptcy proceedings, thus forcing creditors to come to bankruptcy court to collect their claims, and simultaneously complain that the bankruptcy forum denies him or her a jury trial.⁶⁹

The Fifth Circuit recently approved of the result achieved in *Hallahan*, while criticizing the above broad language:

We agree with the result in *Hallahan*, but not its reasoning with regard to why the debtor had no right to a jury trial, even if the claims against him were legal in nature. As we see it, the debtor was not entitled to a jury trial in *Hallahan*, not because the debtor had filed a petition in bankruptcy, but because the plaintiff had submitted his claim against the debtor to the equitable jurisdiction of the bankruptcy court. Filing a proof of claim denied both the plaintiff and the defendant, debtor, any right to jury trial that they otherwise might have had on that

66. The bankruptcy court held that the wilful breach of a contract was excepted from discharge by § 523(a)(6). On appeal, debtor conceded that the breach was wilful, but he did not argue that § 523(a)(6) is inapplicable to contract liability. This was an apparently unwise strategy in light of current authority. See *Friendly Fin. Serv. Mid-City, Inc. v. Modicue* (*In re Modicue*), 926 F.2d 452, 453 (5th Cir. 1991) ("Section 523(a)(6) is based on tort principles rather than contract"); *Palazzolo v. Colclazier* (*In re Colclazier*), 134 B.R. 29 (Bankr. W.D. Okla. 1991); *Dorr & Assocs. v. Pasek* (*In re Pasek*), 129 B.R. 247, 252 (Bankr. D. Wyo. 1991) (intentional breach of contract alone is insufficient to establish a willful and malicious purpose within the meaning of § 523(a)(6); 3 WILLIAM M. COLLIER, COLLIER ON BANKRUPTCY ¶ 523.16 (Lawrence P. King ed., 15th ed. 1991).

67. *Hallahan*, 936 F.2d at 1505.

68. *Id.*

69. *Id.* (citations and footnote omitted).

claim. Debtor's petition in bankruptcy could have no legal effect on plaintiff's claim other than to stay it.⁷⁰

In addition to the current attention paid to the jury trial issue, the effect of prior adjudication is becoming a popular topic. For example, one of the most interesting cases decided during the last survey period, *Barnett v. Stern*,⁷¹ involved the application of claim preclusion principles to bankruptcy litigation. The objective of claim preclusion (*res judicata*) is to achieve finality in litigation by preventing a party from asserting a claim that it could have presented, but did not, in a prior proceeding between the same parties. The related doctrine of issue preclusion (*collateral estoppel*) prevents relitigation of a fact established in a prior proceeding between the same parties. Claim preclusion reduces the cost of litigation by forcing the combination of closely related claims in a single lawsuit. Issue preclusion does not compel litigation of a factual issue, but seeks to prevent the same issue from being litigated twice.

The Seventh Circuit, in *La Preferida, Inc. v. Cervceria Modelo, S.A. de C.V.*,⁷² discussed the application of both principles to litigation occurring during and after a bankruptcy proceeding. In 1976, the debtor-to-be (Corona) licensed plaintiff to distribute Corona beer. This agreement was allegedly terminated in 1982. The following year Corona entered into a similar arrangement with the defendant. Corona's bankruptcy followed in 1984. Plaintiff then filed a proof of claim asserting that Corona's attempt to terminate the contract in 1982 and its subsequent agreement with the defendant were wrongful. Thereafter, the bankruptcy court approved the sale of the Corona trademark to defendant "free and clear of all liens, claims, and encumbrances." Plaintiff did not appeal the order of sale, but claimed that it was reserving its right to sue the defendant. Eight months later, the plaintiff entered into a consent judgment, withdrawing its claim and acknowledging that Corona's 1982 termination of the 1976 agreement was proper. Following the conclusion of the bankruptcy, plaintiff brought an action against defendant seeking a declaration that its 1976 agreement with Corona was enforceable against the defendant.

The defendant first argued that the plaintiff's consent judgment with the debtor contained a finding that the 1976 agreement was terminated in 1982 and prevented any further litigation concerning the continuing

70. *In re Jensen*, 946 F.2d 369, 374 (5th Cir. 1991).

71. 909 F.2d 973 (7th Cir. 1990). This decision is discussed in Boshkoff, *supra* note 1, at 563-67. For a further discussion, see Douglass G. Boshkoff, *Res Judicata and Collateral Estoppel in the Post-Northern Pipeline Era*, NORTON BANKR. L. ADVISER, Feb. 1992, at 5.

72. 914 F.2d 900 (7th Cir. 1990).

validity of the 1976 arrangement. The Seventh Circuit rejected this analysis. Under the rule of *Klingman v. Levinson*,⁷³ a consent judgment can be given collateral estoppel effect.⁷⁴ It was not given such effect in this instance because the consent judgment was ambiguous and did not clearly indicate an intent to bar the subsequent litigation against the defendant.⁷⁵ However, the doctrine of res judicata was applicable.⁷⁶ The effect of the 1976 contract on the plaintiff's rights against the defendant could have been litigated when the bankruptcy court authorized the sale of the trademark. The *La Preferida* litigation was simply a collateral attack on the order of sale and as such, was barred by the principle of claim preclusion.

The effect of a prior adjudication is also discussed in *Bicknell v. Stanley (In re Bicknell)*,⁷⁷ a district court opinion authored by Judge McKinney, which contains an interesting analysis of the relation between state (Indiana) and federal rules of issue preclusion in dischargeability litigation. In *Bicknell*, the question was whether an agreed judgment in state court should be given collateral estoppel effect in subsequent federal dischargeability litigation. As we have seen, the rule in the Seventh Circuit, announced in *Klingman v. Levinson*, is that issue preclusion will occur only if it is clear that the parties to the consent judgment intended to preclude further litigation.⁷⁸ Indiana arguably follows a different rule, announced by the court of appeals in *Hanover Logansport, Inc. v. Robert C. Anderson, Inc.*,⁷⁹ which would preclude further litigation unless there was a clear intent to reserve the issue.⁸⁰ If this was a correct characterization of the law, then it made a difference whether the issue preclusion rule was derived from Indiana precedent or from federal sources.

Judge McKinney first stated that the *Klingman* (federal) rule applied only when the initial consent judgment settled federal litigation.⁸¹ The Full Faith and Credit Statute⁸² required application of Indiana law in a case such as this, when the prior adjudication occurred in state court.⁸³ Judge McKinney then concluded that the Indiana rule, yet to be ruled

73. 831 F.2d 1292 (7th Cir. 1987).

74. *La Preferida*, 914 F.2d at 906.

75. *Id.* at 907.

76. *Id.*

77. 118 B.R. 652 (S.D. Ind. 1990).

78. *Id.* at 654.

79. 512 N.E.2d 465 (Ind. Ct. App. 1987).

80. *Bicknell*, 118 B.R. at 654.

81. *Id.* at 658.

82. 28 U.S.C. § 1738 (1988).

83. *Bicknell v. Stanley (In re Bicknell)*, 118 B.R. 652, 658 (S.D. Ind. 1990).

on by the Indiana Supreme Court, would follow the federal rule, despite the *Hanover Logansport* decision.⁸⁴

This short summary does not do justice to Judge McKinney's meticulous, detailed, and comprehensive review of Indiana and federal law. Although almost twenty pages in length, his opinion is rewarding reading for anyone interested in the relationship between Indiana and federal claim and issue preclusion rules.

IV. AUTOMATIC STAY

The post-bankruptcy effect of a violation of section 362⁸⁵ was considered in two recent cases. In *Pettibone Corp. v. Easley*,⁸⁶ a revested Chapter 11 debtor sought to enjoin the continuation of a lawsuit that had been commenced during bankruptcy in violation of the automatic stay. Nothing in the confirmed reorganization plan prevented prosecution of this action. Judge Easterbrook properly concluded that there no longer was any federal interest to be advanced by enjoining the litigation.⁸⁷ The effect of the completed bankruptcy proceeding upon the claimant's right to go forward in state court was now solely a matter of state law.⁸⁸ Therefore, the bankruptcy court lacked jurisdiction to determine the effect of the violation of the automatic stay.⁸⁹ In another decision, *Price v. Rochford*,⁹⁰ the court decided that an action to recover damages

84. *Id.* at 664-70. By concluding that the Indiana Supreme Court would adopt the majority (*Klingman*) rule, Judge McKinney avoided the necessity of determining whether the exclusive jurisdiction of the bankruptcy court over dischargeability proceedings required a further holding that there was an implied exception to the full faith and credit statute. *Id.* at 658-60, 670.

85. 11 U.S.C. § 362 (1988 & Supp. II 1990).

86. 935 F.2d 120 (7th Cir. 1991).

87. *Id.* at 121.

88. Now the only obstacles to the continuation of the tort suits are the statutes of limitations—Michigan's for two cases and Louisiana's for the third. Whether Michigan or Louisiana would treat a case filed in violation of the automatic stay as a non-event for limitations purposes is a question of state law. No federal interest is in play; the bankruptcy court authorized the continued prosecution of these cases when it confirmed the plan of reorganization. Federal law assured the plaintiffs 30 days in which to pick up the baton; if states want to give plaintiffs additional time, that is their business.

Id. This quotation suggests an interesting line of inquiry. If states are free to determine the effect of a violation of the automatic stay on the running of the statute of limitations, may they also attach consequences to other violations of bankruptcy policy? For example, could a state decide that a violation of the rules against bankruptcy based discrimination also created a cause of action under state law? *Cf. Gonzales v. AM Community Credit Union*, 442 N.W.2d 536 (Wis. Ct. App. 1989) (state law cause of action for wrongful attempt to collect discharged debt).

89. *Pettibone*, 935 F.2d at 122.

90. 947 F.2d 829 (7th Cir. 1991).

for a wilful violation of the automatic stay could be maintained in federal court after dismissal of the bankruptcy case during which the violation occurred.⁹¹

Both decisions are correct and consistent with each other. Once a bankruptcy case is concluded, the affirmative protection provided by the automatic stay is no longer needed. Thus, the litigation may go forward if otherwise permissible under nonbankruptcy law. Nevertheless, the violation of the stay may have resulted in monetary losses to the debtor and these losses remain compensable even though the bankruptcy case has been closed or dismissed. A footnote in *Price* indicates that a cause of action arising during bankruptcy can be enforced by a post-bankruptcy action in United States District Court.⁹² This suggests that an action alleging a post-bankruptcy violation of either section 524(a)(2) or section 525 can also be maintained in a district court action. Thus, there is no need to reopen the bankruptcy case.⁹³

A third decision, *Roete v. Smith (In re Roete)*,⁹⁴ considers the application of the automatic stay to a criminal prosecution under the Indiana check deception statute.⁹⁵ The facts in this case are quite simple. The debtor filed for bankruptcy after giving Smith a bad check. Smith contacted the prosecutor and was advised to present the check for payment. Following the drawee's refusal to honor the check, Smith signed an affidavit required by the prosecutor, and the debtor was arrested. This action for a wilful violation of the automatic stay followed.

Bankruptcy Judge Otte awarded Smith damages of \$3,189, reasoning that a criminal prosecution instituted for debt collection purposes violates the automatic stay, a proposition for which there is respectable lower court authority.⁹⁶ On appeal, the judgment was reversed. The presentment of the check was excepted from application of the stay by section

91. *Id.* at 831-32.

92. *Id.* at 832 n.1.

93. *But cf.* *Cheripka v. Republic Ins. Co. (In re Cheripka)* 122 B.R. 33 (Bankr. W.D. Pa. 1990) (district court lacked jurisdiction to determine dischargeability prior to a filing of petition for bankruptcy), *vacated*, 1992 U.S. App. LEXIS 898 (3d Cir. Jan. 22, 1992).

94. 936 F.2d 963 (7th Cir. 1991).

95. IND. CODE § 35-43-5-5 (Supp. 1991).

96. Judge Otte relied on *St. Joseph Wholesale Liquor Co. v. Butler (In re Butler)*, 74 B.R. 106 (Bankr. W.D. Mo. 1985) and *Underwood v. DeLay (In re DeLay)*, 48 B.R. 282 (Bankr. W.D. Mo. 1984) (dictum). See Entry on Verified Petition for Contempt Citation filed by Debtor, *In re Roete*, No. IP 88-2100J (June 12, 1989) (on file with the *Indiana Law Review*). See also *Hucke v. Oregon (In re Hucke)*, 128 B.R. 675 (D. Ore. 1991) (violation of automatic stay); *Howard v. Allard*, 122 B.R. 696 (W.D. Ky. 1991) (§ 105 injunction against criminal prosecution for purpose of collecting debt); *Bicro Corp. v. Mackes (In re Bicro Corp.)*, 105 B.R. 255 (Bankr. M.D. Pa. 1988) (§ 105 injunction against creditor participation in bad check prosecution); *In re Caldwell*, 5 B.R. 740 (Bankr. W.D. Va. 1980) (§ 105 injunction against creditor participation in bad check prosecution).

362(b)(11).⁹⁷ Therefore, the court reasoned, there was no violation of the stay.⁹⁸ This conclusion ignores the fact that section 362(b)(11) protects only the act of presentment, but does not immunize the entire process of prosecution from scrutiny. The Seventh Circuit failed to explain why the activity which preceded and followed the presentment did not amount to an entirely independent violation of the stay.⁹⁹

Debtors should not be able to negate criminal sanctions by invoking bankruptcy. Nonetheless, courts are entitled to look past legislative labels and examine the substance of a proceeding or a statute.¹⁰⁰ Today, the identification of a true criminal proceeding may be difficult because the demarcation between criminal and civil laws is not as clear as it was fifty years ago. Restitution is now recognized as an element of criminal justice.¹⁰¹ Nevertheless, the compensatory aspect of a criminal remedy can support the inference that it is a private pecuniary interest, rather than the public interest, which is being protected through a prosecution. If the protection of private pecuniary interest predominates, then bankruptcy should abate the pseudocriminal prosecution.¹⁰² To date, this argument has not been persuasive. Debtors have been completely unsuccessful in convincing circuit courts that intervention to protect their interests is either necessary or appropriate.¹⁰³ In one sense then, the

97. 11 U.S.C. § 362(b)(11) (1988).

98. *Roete*, 936 F.2d at 966.

99. Roete argued that § 362(b)(11) did not apply because he had been harassed. The court refused to consider this argument because "[t]he transcript . . . contains no evidence of harassment." *Id.* at 966 n.5. There is no explanation of why the second contact with the prosecutor did not support a finding of harassment. Roete's pleading in the bankruptcy court clearly included the contact with the prosecutor in his charge of harassment. See Verified Petition for Contempt Citation, *In re Roete*, No. IP 88-2100J (March 22, 1989) (on file with the *Indiana Law Review*).

100. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Supreme Court held that Congress's attempt to pass jurisdiction through the district court to the bankruptcy court in 28 U.S.C. § 1471 violated Article III of the Constitution because "it impermissibly removed most, if not all, of the essential attributes of the judicial power from the Article III district court, and has vested those attributes in a non-Article III adjunct." *Id.* at 87.

101. See *Huggett v. State*, 266 N.W.2d 403, 407 (Wis. 1978). See also Katherine A. Francis, Note, *Dischargeability of Criminal Restitution Obligations Under Chapter 13 of the Bankruptcy Code*, 59 U. CIN. L. REV. 1349, 1369-71 (1991).

102. The Eleventh Circuit recently indicated doubt that the Alabama bad check statute provides for criminal sanctions. *Reynolds v. Dixie Nissan (In re Car Renovators)*, 946 F.2d 780, 783 n.6 (11th Cir. 1991).

103. *Fussell v. Price (In re Fussell)*, 928 F.2d 712 (5th Cir. 1991) (refusal to enjoin prosecution for criminal conversion); *United States v. Caddell*, 830 F.2d 36 (5th Cir. 1987) (refusal to enjoin revocation of probation); *Davis v. Sheldon (In re Davis)*, 691 F.2d 176 (3d Cir. 1982) (refusal to enjoin bad check prosecution); *Barnette v. Evans*, 673 F.2d 1250 (11th Cir. 1982) (refusal to enjoin prosecution which might result in restitution

result in *Roete* is consistent with existing authority and is unsurprising. Yet, a strong argument can also be made that in *Roete*, the failure to intervene and find a violation of the automatic stay was a serious mistake. First of all, the potential interference with prosecutorial discretion, a major concern in this area, was negligible. The prosecutor was well aware of the check deception event prior to bankruptcy and had, apparently, decided not to prosecute. It took a second complaint, after bankruptcy had begun, to arouse his interest. More importantly, it is difficult to characterize the Indiana check deception statute as anything other than a glorified collection remedy.¹⁰⁴ Even though the penalty for violation is a misdemeanor,¹⁰⁵ payment of a dishonored check within ten days is a complete defense to prosecution.¹⁰⁶ The prosecutor is denied the discretion to proceed after payment even if he believes that a prosecution would be in the public interest.

Because direct challenges to pseudocriminal prosecutions have been mainly unsuccessful, it may be worthwhile for debtor counsel to consider alternative approaches which eliminate incentives to invoke the criminal process by depriving creditors of restitution gains. One possibility is to seek an injunction which prevents the creditor from accepting payment which is made to bar a criminal prosecution.¹⁰⁷ Another possibility is to persuade the bankruptcy trustee to avoid such a payment under section 547.¹⁰⁸ Recently, the Eleventh Circuit held that a payment made to avoid a possible bad check prosecution was an avoidable preference.¹⁰⁹ Suggesting avoidance is a risky strategy, however, because avoidance of the restitution payment may result in a renewal of the criminal prosecution.

V. DEBTOR BENEFITS: DISCHARGE

Section 523(a)(5) excepts from discharge certain familial obligations, but only if they are owed "to a spouse, former spouse, or child of the

order); *United States v. Carson*, 669 F.2d 216 (5th Cir. 1982) (restitution order is appropriate).

104. For a general criticism of bad check statutes, see Steven Kratsch & William E. Young, *Criminal Prosecutions and Manipulative Restitution: The Use of State Criminal Courts for Contravention of Debtor Relief*, 1984 ANNUAL SURVEY OF BANKR. L. 107; Josephine R. Potuto, *And Mussolini Had the Trains Running on Time: A Review of the Bad Check Offense and the Law Enforcement Debt Collector*, 65 NEB. L. REV. 242 (1986).

105. IND. CODE § 35-43-5-5(a) (Supp. 1991).

106. *Id.* § 35-43-5-5(e).

107. See *Holder v. Dotson (In re Holder)*, 26 B.R. 789 (Bankr. M.D. Tenn. 1982) (debtor was denied permanent injunction enjoining prosecution for bad checks, but the court noted that the creditor was prohibited from accepting restitution as a result of the prosecution).

108. 11 U.S.C. § 547 (1988).

109. *Reynolds v. Dixie Nissan (In re Car Renovators)*, 946 F.2d 780, 782-83 (11th Cir. 1991) (president of debtor-corporation, seeking to avoid criminal prosecution, causes debtor to make restitution).

debtor.”¹¹⁰ Two years ago, the Seventh Circuit held that attorney’s fees incurred by a mother in connection with paternity litigation did not fall within this exception because she was neither a spouse nor former spouse.¹¹¹ At that time the court stated:

The cases which deny discharge for attorneys’ fees incurred to obtain child support assimilate the debt owed the attorney to a debt owed “to a spouse, former spouse, or child of the debtor.” The theory is that the spouse’s or child’s expenses of collection are part of the underlying obligation. That theory cannot stretch to cover fees for an attorney hired by the debtor, unless there is some legal obligation to hire an attorney on behalf of the spouse or child. [Creditor] has admitted that [debtor] had no legal obligation to pursue a support order at all. [Debtor] was merely seeking financial relief in meeting her own support burden. [Debtor’s] contract with [creditor] did not generate a debt to [debtor’s] child. It follows that [debtor’s] obligation to [creditor] was not in the nature of child support.¹¹²

Now the court has taken an apparently inconsistent position in holding that a mother’s pregnancy and confinement expenses are not dischargeable because they are part of a support obligation owed to the child.¹¹³ This time the court reasoned:

[B]ut for the pregnancy, Deanne would not have incurred medical and confinement expenses associated with baby Derek’s birth. These medical services, although performed upon the mother, necessarily and directly benefit the child as well.

. . . .

. . . A father should not be allowed to avoid liability for the mother’s medical care arising from the birth of their child merely because the parents did not marry until after their child was born or did not marry at all.¹¹⁴

This latest reasoning would also support a finding of nondischargeability with reference to the attorney’s fees incurred in an attempt to establish paternity. The definitive opinion on this subject remains to be written.

110. 11 U.S.C. § 523(a)(5) (1988).

111. *In re Rios*, 901 F.2d 71, 72 (7th Cir. 1990).

112. *Id.* (citations omitted).

113. *In re Seibert*, 914 F.2d 102, 106 (7th Cir. 1990).

114. *Id.* at 106-07.

Indiana Nonprofit Corporation Act

PAUL J. GALANTI*

INTRODUCTION

The new Indiana Nonprofit Corporation Act (INCA)¹ was the most significant development in Indiana corporation law during the survey period. The INCA supersedes the Indiana Not-for-Profit Corporation Act of 1971 (1971 Act).² This Article will compare the INCA with the 1971 Act, the Revised Model Nonprofit Corporation Act (Model Act)³ promulgated by the Business Law Section of the American Bar Association, and the Indiana Business Corporation Law (IBCL).⁴

Although business, or for-profit corporations, have greater financial impact on the economic status of Americans as investors, business owners, workers, and consumers of goods and services, nonprofit organizations may play a more important role in our lives.⁵ Nonprofit organizations include churches, political organizations and parties, fraternal organizations, trade associations, labor unions, condominium associations, neighborhood civic leagues,⁶ a substantial majority of large American hospitals, and any number of worthwhile charities. Many of these nonprofit organizations are incorporated.

Corporation law underwent many reforms during the 1980s. The ABA Business Law Section promulgated the Revised Model Business Corporation Act (RMBCA) in 1984.⁷ The RMBCA was the basis for

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1. IND. CODE §§ 23-17-1-1 to -30-4 (Supp. 1991).

2. IND. CODE §§ 23-7-1.1-1 to -66 (repealed 1991).

3. MODEL NONPROFIT CORP. ACT §§ 1.01 - 17.07 (1988). The Model Act was promulgated in 1987. See generally Elizabeth A. Moody, *The Who, What, and How of the Revised Model Nonprofit Corporation Act*, 16 N. KY. L. REV. 251 (1989). Professor Moody chaired the Subcommittee on the Model Nonprofit Corporation Act during most of the final drafting stage.

4. IND. CODE §§ 23-1-17-1 to -54-3 (1988).

5. See Howard L. Oleck, *Mixtures of Profit and Nonprofit Corporation Purposes and Operations*, 16 N. KY. L. REV. 225, 227-30 (1989) [hereinafter Oleck, *Mixtures*]. The terms "nonprofit" and "not-for-profit" are synonymous, although nonprofit is more commonly used today.

6. Americans are great joiners. Professor Oleck quotes Alexis de Tocqueville's observation that Americans are "forever forming associations" for "trade, political, literary and religious interests." *Id.* at 228 n.17 (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1966)).

7. See MODEL BUSINESS CORP. ACT ANN. (1985). See generally 17 PAUL J. GALANTI, *INDIANA PRACTICE — BUSINESS ORGANIZATIONS* § 8.1 (1991).

the IBCL, but the two statutes differ in many significant respects.⁸ This wave of business corporation law reform, coupled with developments relating to nonprofit corporations, prompted the promulgation of the Model Act in 1987.⁹ The introduction to the Model Act notes the deficiencies of its predecessor, the 1964 Model Nonprofit Corporation Act. Among other things, the 1964 statute did not: (1) contain standards of care or loyalty for directors and officers of nonprofit corporations; (2) provide statutory immunity or protection for directors who acted properly in managing the affairs of the corporation when their stewardship was challenged; (3) provide conflict of interest rules; and (4) deal with such significant matters as derivative suits, transfers and purchases of memberships, or the resignation or termination of memberships.¹⁰ The earlier statute was also silent on such significant matters as nonprofit corporations controlled by "delegates," and it did not deal adequately with self-perpetuating boards of directors or the delegation of authority by directors.¹¹

The same observations could be applied to the 1971 Act. Although the statute was updated from time to time,¹² Indiana nonprofit organizations, like those in most states, needed a modern, flexible, state of the art statute representing current thinking about the law of nonprofit corporations. The INCA is such a statute. However, the statute is not immune from criticism, and in some respects, it disserves persons who are "members" of Indiana nonprofit corporations or who are benefited or served by one such organization.

I. DRAFTING THE INCA

There was a clear need to make the laws regulating nonprofit corporations more flexible with respect to the rights, duties, and obligations of both members and managers. To some degree, the Model Act can be criticized for unduly favoring the interests of the managers of nonprofit corporations over the interests of members or those who are served by or are the beneficiaries of such organizations.¹³ However, the Model Act's drafters struck a better balance between the interests of the various constituencies than did the INCA's drafters.

8. See 17 GALANTI, *supra* note 7, § 8.1, at 458-59.

9. See MICHAEL G. HONE, INTRODUCTION TO REVISED MODEL NONPROFIT CORPORATION ACT xiii, xix (1988).

10. *Id.*

11. *Id.* at xx.

12. See 20 GALANTI, *supra* note 7, § 53.1. See generally John T. Baker, *Regulation of Not-For-Profit Corporations in Indiana*, 18 IND. L. REV. 777 (1985).

13. See Oleck, *Mixtures*, *supra* note 5, at 234-38, 244-46.

The problem, to the extent there really is a problem, arises because both statutes were drafted by "business lawyers."¹⁴ This statement is not meant to disparage "business lawyers," but to question the wisdom of having lawyers responsible for the current generation of business corporation statutes also responsible for the statutes regulating "non-business" corporations.¹⁵

The observation that in contemporary American culture purely for-profit organizations might engage in nonprofit operations, and nonprofit organizations often engage in profit-generating operations to supplement donations or other sources of funds, might seem to justify having common drafters of both types of corporation statutes or even having the same statute apply to both business and nonprofit corporations. However, recent business corporation statutes such as the IBCL free corporate management from many traditional statutory constraints on conducting business affairs, with a concomitant lessening of their accountability to shareholders.¹⁶ These statutes serve the needs of American businesses engaged in fierce global competition. However, it is not clear that the same approach is appropriate when applied to the relations between managers of nonprofit corporations and the members, contributors,

14. The Model Act was drafted by a subcommittee of the ABA's Business Law Section. The INCA was drafted by the Indiana Corporation Law Survey Commission which is charged with considering recommendations concerning amendments to both the IBCL and the INCA. See IND. CODE § 23-1-54-3 (1988). See generally 17 GALANTI, *supra* note 7, § 8.16.

15. See Oleck, *Mixtures*, *supra* note 5, at 243-44. See also Harry G. Henn & Jeffery H. Boyd, *Statutory Trends in the Law of Nonprofit Organizations: California Here We Come!*, 66 CORNELL L. REV. 1103, 1107 (1971). Professor Oleck in his treatise on nonprofit organizations, asserted that a committee not dominated by "corporate, finance, and business lawyers" might be the best source of a final draft of a nonprofit corporation statute. HOWARD L. OLECK, *NONPROFIT CORPORATIONS, ORGANIZATIONS AND ASSOCIATIONS* 1189-90 (4th ed. 1980). He renewed this call in his commentary on the Revised Model Nonprofit Corporation Act. Oleck, *Mixtures*, *supra* note 5, at 243. He also posits that proper planning of a nonprofit corporation statute would "envisage stern supervision by public officials of nonprofit organizations, because of the certainty that privileged status — which nonprofit organizations have — will attract unprincipled exploiters who want the privileges but who do not intend to accept the concomitant burdens of public duty and *pro bono* selflessness." *Id.* at 244. He favors a nonprofit corporation statute drafted by a committee composed of theologians, anthropologists, psychologists, and persons from other nonlegal disciplines, with corporation and business lawyers relegated to a supporting tier. *Id.*

16. Moody, *supra* note 3, at 264-65, states that as a result of comments received on the Exposure Draft of the Model Act, optional § 2.02(b)(5) was added to the statute. This section allows provisions in the articles eliminating or limiting personal liability of directors to a nonprofit corporation or its members. This provision derives from § 102(b)(7) of the Delaware Corporation Act which allows similar provisions limiting liability of directors of business corporations. DEL. CODE ANN. tit. 8, § 102(b)(7) (1991).

supporters, or beneficiaries of such organizations. In fact, the nature of nonprofit corporations calls for more, rather than less, accountability from their stewards.¹⁷ Even if potential personal liability of directors and officers justifies some relaxation of the standards for the managers of nonprofit corporations, there is some question whether the standards should be relaxed to the extent of modern nonprofit corporation statutes.¹⁸

Professor Oleck and others have argued that the standards should be raised, not lowered, and that business lawyers should not be the final arbiters of the law pertaining to "altruistic, voluntaristic, *pro bono* organizations—organizations whose purposes are supposed to be selfless, spiritual, and in the public service."¹⁹ In the past, such organizations were subjected to different forms of regulation because of the fundamental differences between the goals and objectives of such organizations and those of business enterprises.²⁰ Nonprofit organizations were governed by rules appropriate to moral, social, political, charitable, or cultural purposes, rather than by rules appropriate for profit oriented enterprises. Whatever merits this argument enjoys, it is, however, a minority view, and business lawyers will continue to draft and revise nonprofit corporation statutes for the foreseeable future.

The Model Act's drafters decided early to track and parallel the RMBCA as much as possible unless the nature of nonprofit corporations or public policy reasons dictated otherwise.²¹ Even a cursory glance at the INCA shows that its drafters followed the same approach, except that the INCA tracks the IBCL. This is important, because although the RMBCA attempts to strike a fair balance between management

17. There is little support for the proposition that the directors of nonprofit corporations should be held to the standard expected of "trustees," an argument rejected by the court in *Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries*, 381 F. Supp. 1003 (S.D.N.Y. 1974). However, many commentators have urged that the directors of charitable or public benefit corporations should be held to a higher fiduciary standard than the directors of nonprofit mutual benefit corporations such as fraternities. See Baker, *supra* note 12, at 818-19. The recent controversy over the salary and perquisites enjoyed by the president of the National United Way Organization, unfortunately, gives considerable substance to this concern.

18. See Oleck, *Mixtures*, *supra* note 5, at 244-46. A major reason for incorporating nonprofit organizations is to lessen or eliminate personal liability of members of the group for acts furthering the purposes of the organization. See generally 20 GALANTI, *supra* note 7, § 53.1; Baker, *supra* note 12, at 780.

19. See Oleck, *Mixtures*, *supra* note 5, at 243-44. See also Henn & Boyd, *supra* note 15, at 1107.

20. See Oleck, *Mixtures*, *supra* note 5, at 225.

21. See HONE, *supra* note 9, at xx. The numbering of Model Act sections, in fact, follow the analogous RMBCA provisions, even when the two statutes are substantively different.

interests and shareholder interests, the IBCL is more solicitous of management, particularly in publicly-held corporations.²² Wholesale adoption of the IBCL philosophy therefore makes some substantive provisions of the INCA problematic compared to the more balanced, comparable provisions of the Model Act.

The IBCL does furnish an easy "model" or "form book" for drafting an Indiana nonprofit corporation statute, and the similarity between the two statutes simplifies the work of Indiana attorneys in that they do not have to be familiar with two statutes with disparate substantive provisions and structure. Ease of drafting should not, however, be a major consideration in fashioning an important statute. Furthermore, Indiana attorneys can easily master two distinct corporation statutes.

This criticism does not gainsay the wisdom of using a modern business corporation statute such as the IBCL as a guide in drafting the "mechanical" aspects of a nonprofit corporation statute. Modern business corporation statutes simplify the incorporation process,²³ and there is no reason that the process should be significantly more difficult for nonprofit corporations. It is important, however, that the process differ in one major respect. Both the Model Act²⁴ and the INCA²⁵ recognize that not all nonprofit corporations are alike, and that they may require individualized provisions in the articles of incorporation. These requirements force incorporators to consider and evaluate the nature and essence of the nonprofit corporation being formed at the outset.²⁶

II. COMPARATIVE ANALYSIS OF THE INCA

A. *The Three Types of Nonprofit Corporation*

Nonprofit corporations fall into three basic categories reflecting the variety of activities in which such corporations engage.²⁷ There are public benefit corporations, mutual benefit corporations, and religious corporations.²⁸ Public benefit corporations operate for public or charitable

22. See 17 GALANTI, *supra* note 7, § 8.1.

23. See *id.* § 10.1.

24. MODEL NONPROFIT CORP. ACT § 2.02(a)(2) (1988). See *id.* § 2.02 official cmt. See generally Hone, *supra* note 9, at xxi-xxxii.

25. IND. CODE § 23-17-3-2(a) (Supp. 1991).

26. See HONE, *supra* note 9, at xxxi-xxxii.

27. See *id.* at xxi-xxx. See also Moody, *supra* note 3, at 259-60, 266-67.

28. The statutes recognize one subcategory of nonprofit corporations by including provisions relating to private foundations as defined in the Internal Revenue Code. IND. CODE § 23-17-25-1 (Supp. 1991); MODEL NONPROFIT CORP. ACT § 1.50 (1988).

purposes and hold themselves out as "doing good works, benefiting society or improving the human condition."²⁹ Mutual benefit corporations benefit their members or groups of people they serve or represent.³⁰ Religious corporations are those operating primarily or exclusively for religious purposes.³¹ The Model Act and the INCA apply different rules to the three types of corporations. Consequently, the articles of incorporation must specify whether the corporation will be a public benefit corporation, a mutual benefit corporation, or a religious corporation.³²

Allowing the organizers of a nonprofit corporation to designate the type of organization being formed is a major change from prior nonprofit corporation law.³³ However, incorporators are not free to choose any category they desire. For example, public benefit or religious corporations cannot follow the rules for mutual benefit corporations and obtain tax-exempt status. A mutual benefit corporation may make distributions to its members upon dissolution,³⁴ but a corporation cannot make distributions to its members upon dissolution and obtain tax-exempt status under Internal Revenue Code section 501(c)(3).³⁵

The INCA and the Model Act both define three types of corporations, but their language differs.³⁶ In the INCA, a mutual benefit corporation means a domestic corporation that is formed as a mutual benefit corporation under the Act, designated as a mutual benefit corporation by another law, or is not a public benefit corporation or religious corporation.³⁷ The INCA defines a public benefit corporation as a domestic corporation that: (1) is formed as a public benefit corporation under the Act, designated a public benefit corporation by another law, is recognized as tax exempt under section 501(c)(3) of the Internal Revenue Code, or is otherwise organized for a public or charitable purpose; (2) is restricted in the distribution of assets on dissolution to similar or religious corporations; and (3) is not a religious corporation.³⁸ The INCA

29. See HONE, *supra* note 9, at xxiv-xxviii.

30. See *id.* at xxviii-xxix.

31. Religious corporations are regulated less than other nonprofit corporations because of First Amendment issues. IND. CODE § 23-17-30-2 (Supp. 1991). See HONE, *supra* note 9, at xxix-xxx.

32. IND. CODE § 23-17-3-2(2) (Supp. 1991); MODEL NONPROFIT CORP. ACT § 2.02(a)(2) (1988).

33. Nonprofit corporation statutes generally tended to apply a uniform set of rules to all nonprofit corporations. HONE, *supra* note 9, at xxi-xxii.

34. IND. CODE § 23-17-22-5(a)(7) (Supp. 1991); MODEL NONPROFIT CORP. ACT § 14.06(a)(7) (1988).

35. See I.R.C. § 501(c)(3) (1988 & Supp. I 1989).

36. IND. CODE §§ 23-17-2-19, -23, -25 (Supp. 1991); MODEL NONPROFIT CORP. ACT § 1.40(23), (28), (30) (1988).

37. IND. CODE § 23-17-2-19 (Supp. 1991).

38. *Id.* § 23-17-2-23.

defines a religious corporation as a domestic corporation formed as a religious corporation under the statute, designated as a religious corporation by another law, or organized primarily or exclusively for religious purposes.³⁹ The Model Act defines the three types of nonprofit corporations in terms of whether they are formed as such⁴⁰ or if in existence on the effective date of the statute in an adopting state, they are treated as such.⁴¹

B. Management Accountability

Until recently, nonprofit corporation statutes did not establish standards of conduct for, or provide a means for ensuring the accountability of, the managers of nonprofit corporations.⁴² Conversely, the statutes did not provide adequate protection to managers against the expenses attendant to litigation challenging their stewardship. As a result, the Model Act establishes general standards of conduct for directors similar to the standards for directors of business corporations under the RMBCA.⁴³ The INCA also provides standards of conduct for the directors of nonprofit corporations, but these standards are based on the provisions of the IBCL, so they are more favorable to the directors than the provisions of the Model Act.

Both statutes spell out the duties of directors.⁴⁴ The Model Act provides that directors are not liable to the corporation, any member, or any other person for any action or inaction as a director, if the director acted in compliance with the standards established by the statute.⁴⁵ The INCA incorporates IBCL section 23-1-35-1(e)(2) to impose liability on a director of a nonprofit corporation only if the director's "breach or failure to perform constitutes willful misconduct or recklessness."⁴⁶ The author, although recognizing the directors and officers liability crisis of the 1980s, believes the IBCL sets too low a standard for the directors of business corporations.⁴⁷

39. *Id.* § 23-17-2-25.

40. MODEL NONPROFIT CORP. ACT § 1.40(23), (28), (30) (1988).

41. *Id.* § 17.07.

42. See HONE, *supra* note 9, at xxxv-xxxvii. Professor Moody states that more attention was lavished on the Model Act provisions relating to directors than any other chapter. Moody, *supra* note 3, at 274-76.

43. MODEL BUSINESS CORP. ACT ANN. § 8.30 (1985).

44. IND. CODE § 23-17-13-1 (Supp. 1991); MODEL NONPROFIT CORP. ACT § 8.30 (1988).

45. MODEL NONPROFIT CORP. ACT § 8.30(d) (1988). The Model Act contains an optional section permitting the articles of incorporation to limit or eliminate personal liability of directors.

46. IND. CODE § 23-17-13-1(d)(2) (Supp. 1991).

47. See 18 GALANTI, *supra* note 7, § 25.2. See generally J. Steven Rawlings, *Liability*

To whatever extent this view is valid, the standard of the business world is too lenient for many, if not most, nonprofit corporations. The IBCL standard might be appropriate for the directors of mutual benefit corporations in which the members maintain a degree of control over the directors akin to that enjoyed in theory by corporate shareholders. However, the standard is less appropriate, if not inappropriate, when applied to public benefit corporations and religious corporations encompassing a substantial degree of public trust and confidence. Such corporations may not have members who can police directors, and unlike the Model Act, the INCA limits the attorney general's oversight powers.⁴⁸

The INCA is also more liberal with respect to the liability of directors for unlawful distributions than is the Model Act. The INCA tracks the IBCL, which imposes liability on directors for unlawful distributions only if their actions constitute wilful misconduct or recklessness.⁴⁹ Liability under the Model Act is possible if a director voting for or assenting to an unlawful distribution fails to discharge her duties in compliance with the standards of the statute.⁵⁰ Liability under the INCA for an unlawful distribution requires not only failure of the director to satisfy her statutory duty, but also wilful misconduct or recklessness.⁵¹

Both the INCA and the Model Act have extensive provisions relating to officers of nonprofit corporations.⁵² The role of officers of nonprofit corporations might differ from the role of their counterparts in business corporations. For example, it is not uncommon for the title "president" of a nonprofit corporation to be bestowed on a major donor, while the day-to-day activities of the organization are run by an employee designated executive director or some similar title.⁵³ The INCA differs from the Model Act in two major respects. Following the IBCL pattern, the drafters deleted the Model Act provisions setting standards for officers.⁵⁴ The IBCL drafters thought that officer standards were inconsistent with the basic concept that officers are chosen by, report to, and are subject

of Officers and Directors: Extending the Safe Harbor to Nonprofit Corporate Statutory Law, 16 N. KY. L. REV. 345 (1989); Daniel E. Tobergte, *Regulating the Nonprofit Corporation*, 16 N. KY. L. REV. 325 (1989).

48. See *infra* notes 110-13 and accompanying text.

49. IND. CODE § 23-17-13-4 (Supp. 1991).

50. MODEL NONPROFIT CORP. ACT §§ 8.30(d), 8.33 (1988).

51. IND. CODE § 23-17-13-4(a) (Supp. 1991). A director held liable for an unlawful distribution is entitled to contribution from other directors and from each person who received the distribution whether or not the person knew the distribution was improper. *Id.* § 23-17-13-4(b).

52. IND. CODE §§ 23-17-14-1 to -4 (Supp. 1991); MODEL NONPROFIT CORP. ACT §§ 8.40-8.45 (1988).

53. See MODEL NONPROFIT CORP. ACT § 8.40 official cmt. (1988).

54. *Id.* § 8.42.

to the direction of the board of directors.⁵⁵ The drafters of the RMBCA⁵⁶ and the Model Act⁵⁷ found no such inconsistency and concluded that having a statutory standard of conduct for officers would provide guidance to nondirector officers exercising discretionary authority. The omission of the officer-conduct standard might be significant because the Model Act expressly recognizes the right of officers of religious corporations to rely on information and reports prepared by religious authorities.⁵⁸ The conduct of officers of Indiana nonprofit corporations will be judged by common-law agency and contract principles,⁵⁹ and it is not clear how far courts will go in allowing reliance on such reports. Hopefully, they will allow such reliance because it is unlikely that the INCA drafters intended to tighten the standards imposed on officers of nonprofit corporations by omitting statutory standards.

The INCA also deleted a Model Act provision whereby a contract signed by certain officers is not invalid as to the corporation because of lack of authority of the signing officers, absent actual knowledge as to the lack of authority of the other party to the contract.⁶⁰ The Model Act provision is a safe harbor, intended to protect third parties who rely on the signatures of the specified officers acting on behalf of a nonprofit corporation when authority of officers may be less than clear.⁶¹ Under the INCA, third parties will have to rely on the common-law concept of apparent authority when, in fact, there is no actual authority.

C. Officer Indemnification

The introductory comment to the indemnification provisions of the Model Act states that such provisions "as in all modern corporation enactments, are central to the Act."⁶² There was considerable confusion and uncertainty whether nonprofit corporations could or should indemnify officers and directors from personal liability.⁶³ Some courts went so far as to hold that there was no right to indemnification in the absence of statutory authority.⁶⁴ The basic issue did not present a problem in Indiana because the 1971 Act authorized not-for-profit corporations

55. IND. CODE § 23-1-36-2 official cmts. (1988).

56. See MODEL BUSINESS CORP. ACT ANN. § 8.42 official cmt. (1985).

57. See MODEL NONPROFIT CORP. ACT § 8.42 official cmt. (1988).

58. *Id.* § 8.42(b)(3).

59. See IND. CODE § 23-1-36-2 official cmts. (1988).

60. MODEL NONPROFIT CORP. ACT § 8.45 (1988).

61. See *id.* § 8.45 official cmt.

62. See *id.* subch. E, introductory cmt., at 239.

63. *Id.*

64. *Texas Soc'y v. Fort Bend Chapter*, 590 S.W.2d 156 (Tex. Civ. App. 1979).

to indemnify directors, officers, and agents⁶⁵ and to purchase director and officer liability insurance.⁶⁶ Initially, the indemnification provisions of the 1971 Act were based on the comparable provisions of the Indiana General Corporation Act, which preceded the IBCL.⁶⁷ They were amended in 1989 to track the indemnification provisions of the IBCL.⁶⁸ This pattern is continued in the INCA. Consequently, the indemnification provisions of the INCA are broader than the indemnification provisions of the Model Act, just as the indemnification provisions of the IBCL are broader than those of the RMBCA.

In discussing the indemnification provisions of the Model Act, Professor Hone notes that the problems that prompted broadened indemnification provisions in business corporation statutes now face nonprofit corporations.⁶⁹ However, the differences between business and nonprofit corporations justify different statutory indemnification rights. The power of shareholders of business corporations to sanction directors whose conduct is wrongful or carried out in bad faith justifies broad indemnification provisions. By contrast, more stringent statutory constraints must be imposed on corporate authority to indemnify directors and officers for those nonprofit corporations without members. To allow directors of nonprofit corporations total exoneration from the consequences of improper conduct "would violate tenets of public morality and trust."⁷⁰

The Model Act balances the necessary protection of corporate officials, the nonprofit corporation itself, and the public by giving mandatory indemnification to directors in certain situations⁷¹ and by limiting indemnification when the director or officer has breached a duty to the corporation.⁷² The Model Act requires court approval for indemnification of directors in derivative actions and limits indemnification to the reasonable expenses incurred.⁷³ The Model Act also requires court approval for indemnification of a director found liable for having improperly received a personal benefit.⁷⁴

65. IND. CODE § 23-7-1.1-4(b)(9) (repealed 1991).

66. *Id.* § 23-7-1.1-4(b)(10) (repealed 1991).

67. *Id.* § 23-1-2-2(b)(9), (10) (repealed 1991).

68. *Id.* §§ 23-7-1.1-69 to -77 (repealed). See generally 19 GALANTI, *supra* note 7, ch. 26.

69. See MODEL NONPROFIT CORP. ACT subch. E, introductory cmt., at 239-40 (1988).

70. *Id.* at 240.

71. *Id.* § 8.52.

72. *Id.* § 8.51(d).

73. *Id.* § 8.54.

74. *Id.* § 8.54(2). If the director is adjudged liable, indemnification is also limited to reasonable expenses incurred.

The INCA followed the IBCL and eliminated these constraints. As a result, court approval is not required for indemnification of a director of a nonprofit corporation who has been held liable for receiving an improper personal benefit.⁷⁵ A director who can satisfy disinterested directors, a committee of directors, special legal counsel, or the corporation's members that he, although liable, met the INCA's director standards of conduct, is eligible for indemnification.⁷⁶ The INCA tracks the Model Act in requiring a nonprofit corporation to notify members in writing with or before the notice of the next annual meeting if it indemnifies or advances expenses to a director in connection with "a proceeding by or in the right of the corporation."⁷⁷ That requirement might impose limits on liberal indemnification of directors of nonprofit corporations with members, but has no impact on a nonprofit corporation run by a self-perpetuating board of directors. This is a situation in which simply adopting IBCL indemnification provisions disserves the public interest.

D. Conflicts of Interest

The Model Act also contains extensive conflict of interest provisions applicable to directors of nonprofit corporations.⁷⁸ The standards vary depending on the type of corporation. Directors of mutual benefit corporations are held to the RMBCA conflict of interest standard because such corporations are most like business corporations.⁷⁹ A higher standard than the business judgment rule was adopted for the directors of public benefit corporations and religious corporations because the public perceives that such corporations are trustworthy.⁸⁰ The drafters of the Model Act noted that contributors to public benefit corporations expect that their money will be used for the public good and not to benefit individual directors.⁸¹ The Model Act's higher standard for directors of public benefit corporations ensures that this expectation is fulfilled.⁸²

The drafters of the INCA rejected this distinction in setting standards for directors. The INCA applies the conflict of interest standard of the IBCL to the directors of *all three types* of nonprofit corporations.⁸³

75. See generally 18 GALANTI, *supra* note 7, §§ 26.3, 26.5.

76. IND. CODE § 23-17-16-12 (Supp. 1991).

77. *Id.* § 23-17-27-7; MODEL NONPROFIT CORP. ACT § 16.21 (1988).

78. MODEL NONPROFIT CORP. ACT § 8.31 (1988).

79. HONE, *supra* note 9, at xxxvi (1988).

80. *Id.* at xxxvi-xxxvii.

81. *Id.* at xxvi.

82. *Id.*

83. IND. CODE § 23-17-13-2 (Supp. 1991). The actual wording of this section does differ from the language of the comparable IBCL provision, IND. CODE § 23-1-35-2 (1988). See generally 18 GALANTI, *supra* note 7, § 25.5 (1991).

Thus, any conflict of interest transaction is not void or voidable if: (1) it is approved by a disinterested majority of directors when the corporation has no members; (2) is approved by the members when the corporation has members; or (3) when the transaction is fair and reasonable to the corporation.⁸⁴ To avoid a situation which, at a minimum, would create the appearance of impropriety, the Model Act provides an option for a corporation to obtain judicial or attorney general approval of a conflict of interest transaction for public benefit corporations and religious corporations.⁸⁵

The Model Act contains an optional provision intended to ensure that a majority of the directors of public benefit corporations do not have a built-in conflict of interest by limiting the number of directors who are financially interested persons.⁸⁶ The drafters made the provision optional because many committee members felt it would impose an undue burden on such corporations without effectively preventing intentional abuses.⁸⁷ The INCA's drafters did not adopt this provision.

E. Oversight Authority

The drafters of the Model Act realized that previous nonprofit corporation statutes lacked effective oversight authority, particularly with respect to public benefit corporations.⁸⁸ The directors of a nonprofit corporation might be unwilling to sue a fellow director, and there might not be adequate incentive for members of public benefit corporations, if the corporation has members, to exercise whatever oversight powers they possess to hold directors accountable for the expenditure of corporate funds.

The response of the Model Act's drafters to this deficiency was to give the attorney general of an adopting state broad oversight powers over public benefit corporations. This provision, which represents a major departure from prior nonprofit corporation statutes, protects the interests of persons connected with public benefit corporations, such as financial donors.⁸⁹

84. IND. CODE § 23-17-13-2 (Supp. 1991).

85. MODEL NONPROFIT CORP. ACT § 8.31(b)(2) (1988).

86. *Id.* § 8.13.

87. *See id.* § 8.13 official cmt. Professor Oleck was particularly distressed with this provision because it legalize rather than prohibits conflicts of interest. Oleck, *Mixtures*, *supra* note 5, at 246.

88. MODEL NONPROFIT CORP. ACT §§ 1.70, 6.30, 8.10 (1988). *See HONE*, *supra* note 9, at xxvii.

89. *See* MODEL NONPROFIT CORP. ACT § 1.70 official cmt. (1988). *See also HONE*, *supra* note 9, at xxvii.

The INCA's drafters rejected the Model Act's oversight approach and provided only limited state oversight of nonprofit corporations by the attorney general and the secretary of state. This decision is questionable. It can be asserted that granting the Indiana attorney general oversight authority is an unwarranted expansion of prior Indiana law as reflected in the 1971 Act.⁹⁰ However, to do so ignores the observation that the absence of such authority from the previous generation of statutes in part prompted the revision of the 1964 Model Act.

For example, if a court concludes that removal of a director is in the best interest of the corporation, the Model Act gives the attorney general the authority to seek judicial removal of directors of public benefit corporations who have engaged in fraudulent or dishonest conduct or who have grossly abused their authority or discretion.⁹¹ The INCA authorizes judicial removal of directors in an action brought by the corporation or by ten percent of the members,⁹² but does not authorize the attorney general to bring such an action. Obviously, this is a major loophole for directors of nonprofit corporations *without* members.

The INCA, unlike the Model Act, does not authorize the attorney general of an adopting state to request court-ordered meetings of public benefit corporations.⁹³ The INCA also omits the Model Act's general requirement that the attorney general be given notice of the commencement of any proceeding by another person that the attorney general could have brought.⁹⁴ Even more significant is the omission of the attorney general's authority to bring an action against a director for breach of a duty of care or loyalty.⁹⁵

The Model Act limits the right of public benefit corporations to merge unless the attorney general is notified.⁹⁶ Although the INCA confers no general oversight power, it does require notification of the attorney general when court approval of a merger is required.⁹⁷ Public benefit corporations and religious corporations must give written notice to the attorney general before they sell, lease, or otherwise dispose of all or

90. The drafter's intended to exclude "major policy changes or controversial provisions" from the INCA. Constance J. Godvia, *Overview of Indiana Nonprofit Act of 1991*, NONPROFIT CORPORATIONS 1991, at 3 (1991) (ICLEF). This is an ironic statement from the chairperson of the Corporate Law Survey Commission considering how much the INCA changes prior law.

91. MODEL NONPROFIT CORP. ACT § 8.10(a) (1988).

92. IND. CODE § 23-17-12-13 (Supp. 1991).

93. MODEL NONPROFIT CORP. ACT § 7.03(a) (1988).

94. *Id.* § 1.70.

95. *Id.* §§ 1.70, 3.04(c), 6.30(c).

96. *Id.* § 11.02(a).

97. IND. CODE § 23-17-19-2(a) (Supp. 1991).

substantially all of their property.⁹⁸ They must also notify the attorney general if they intend to dissolve.⁹⁹

In fact, the drafters of the INCA reduced the oversight of nonprofit corporations compared to the 1971 Act. The 1971 Act gave the secretary of state substantial oversight authority to at least ensure that the interests of those affected by nonprofit corporations were protected. For example, the 1989 changes to the director accountability provisions of the 1971 Act¹⁰⁰ were balanced by subjecting the nonprofit corporation itself to remedial sanctions for defective director performance.¹⁰¹ Section 23-7-1.1-63 of the 1971 Act authorized the secretary of state to refuse to file papers submitted by not-for-profit corporations when the secretary of state decided that the corporation was: (1) not acting in good faith as a not-for-profit corporation; (2) was violating provisions of the statute or other laws; or (3) was engaging in conduct improperly beneficial to persons, firms, or corporations.¹⁰² The 1971 Act also authorized the secretary of state to certify violations of the statute to the attorney general who was to bring an action to dissolve the corporation.¹⁰³ The INCA follows the Model Act¹⁰⁴ in that the attorney general can seek judicial dissolution of nonprofit corporations in certain circumstances.¹⁰⁵ However, it is unclear how the attorney general will learn of questionable conduct absent involvement by her office or by the secretary of state.

The INCA follows the Model Act and modern business corporation statutes such as the IBCL by casting the secretary of state in a "ministerial" role with respect to filing documents.¹⁰⁶ The 1971 Act required the secretary of state to determine if certain fundamental corporate documents of not-for-profit corporations, such as articles of incorporation, "conformed to law" before issuing a certificate of incorporation.¹⁰⁷ Under the INCA, the secretary of state only determines if a document submitted for filing complies with the statutory requirements for filing.¹⁰⁸ This change might not actually reduce effective state oversight authority over nonprofit corporations because it is unclear that examining

98. MODEL NONPROFIT CORP. ACT § 12.02(g) (1988). The INCA omits this requirement.

99. *Id.* § 14.03.

100. IND. CODE § 23-7-1.1-10.5 (repealed 1991).

101. *Id.* § 23-7-1.1-66 (repealed 1991).

102. *Id.* § 23-7-1.1-63 (repealed 1991).

103. *Id.*

104. MODEL NONPROFIT CORP. ACT § 14.30 (1988).

105. IND. CODE § 23-17-24-1(a) (Supp. 1991).

106. *Id.* § 23-17-29-6. See MODEL NONPROFIT CORP. ACT § 1.25 official cmt. (1988).

107. IND. CODE § 23-7-1.1-19 (repealed 1991).

108. IND. CODE §§ 23-17-29-1, -6 (Supp. 1991).

the substance of documents before filing really protected the interests of those involved in not-for-profit corporations. The requirement might even have hindered the incorporation process. No objections can be raised to other steps that facilitate incorporation of nonprofit corporations by eliminating anachronistic requirements, such as having to specify the duration of a corporation in the articles when almost all corporations have perpetual duration.¹⁰⁹

There are other situations in which the oversight authority of the attorney general or members of nonprofit corporations is more circumscribed under the INCA than under the Model Act. Under the Model Act, the attorney general must be notified when a derivative action concerning assets held in trust is filed against a mutual benefit corporation¹¹⁰ and of all derivative actions against public benefit corporations.¹¹¹ The attorney general can intervene in such actions.¹¹² The INCA does not impose this notification requirement. This omission may not be too surprising because the INCA, unlike the Model Act,¹¹³ does *not* expressly authorize derivative suits.

F. Derivative Suits

The court in *Kirtley v. McClelland*¹¹⁴ recognized the right of a member of an Indiana not-for-profit corporation organized under the 1971 Act to bring a derivative action to remedy the defendant's breach of duty. However, it is possible that the INCA's drafters intended to eliminate this right.¹¹⁵ The relevant provision of the Model Act¹¹⁶ resolves most issues pertaining to derivative suits by directors and members of nonprofit corporations, and the IBCL also has express provisions relating to shareholder derivative suits.¹¹⁷ In fact, the IBCL provision limits shareholder derivative suits more than the comparable RMBCA provision.¹¹⁸ The INCA's conscious omission of a provision comparable to that in the

109. Nonprofit corporations have perpetual duration unless otherwise limited in their articles. *Id.* § 23-17-4-2.

110. MODEL NONPROFIT CORP. ACT § 6.30(f) (1988).

111. *Id.*

112. *Id.* § 1.70(b)(2).

113. *Id.* § 6.30.

114. 562 N.E.2d 27 (Ind. Ct. App. 1990).

115. Certainly, the drafters rejected Professor Baker's suggestion that at "a bare minimum," the 1971 Act "should be amended to permit derivative actions my members of nonprofits." Baker, *supra* note 12, at 829.

116. MODEL NONPROFIT CORP. ACT § 6.30 (1988).

117. IND. CODE §§ 23-1-32-1 to -5 (1988). See generally 19 GALANTI, *supra* note 7, §§ 38.4, 38.6.

118. The IBCL litigation committee provision is more liberal than its RMBCA counterpart. See generally 19 GALANTI, *supra* note 7, § 38.19.

IBCL authorizing litigation committees to terminate groundless derivative actions and, therefore, protect corporate management, makes sense only if the drafters intended to overrule *Kirtley*.

The extensive director and officer indemnification provisions of the INCA¹¹⁹ are based on the IBCL.¹²⁰ However, with respect to mandatory director indemnification, the INCA omits the reference to proceedings "by or in the right of the corporation" (meaning derivative suits). The IBCL also omits such language.¹²¹ The drafters of the INCA omitted Model Act section 8.51(d) and (e),¹²² which contains such language. The IBCL's drafters omitted comparable provisions contained in the RMBCA.¹²³ The Model Act and the RMBCA provisions therefore require directors to obtain court-approved indemnification in certain shareholder derivative suits.¹²⁴ The IBCL approach liberalizes the mandatory indemnification rights of directors of business corporations without casting doubt on the long recognized right of shareholders to bring derivative actions. One cannot be so sanguine with respect to the INCA. Perhaps the INCA's drafters felt that omitting the language requiring court approval of indemnification payments liberalizes the indemnification rights of directors of nonprofit corporations, as in the IBCL, and that a statutory provision on derivative actions was unnecessary in light of *Kirtley*. However, this is a problematic stance. Even the Model Act's drafters thought it wise to include statutory authority for such suits, and the right of members of nonprofit corporations to bring derivative actions is not as well established.

The evidence that the drafters intended to cast doubts on the viability of *Kirtley* is not conclusive. The INCA requires a nonprofit corporation to notify members if it indemnifies or advances expenses to a director in connection with "a proceeding by or in the right of the corporation,"¹²⁵ and this provision, at least by implication, supports derivative actions by members of nonprofit corporations. Of course, the INCA's drafters might have simply included the IBCL's indemnification language without considering its possible impact on the right of members and directors of nonprofit corporations to bring derivative actions. Hopefully, Indiana

119. IND. CODE §§ 23-17-16-1 to -15 (Supp. 1991). See *supra* notes 75-87 and accompanying text.

120. IND. CODE §§ 23-1-37-1 to -15 (1988). See generally 19 GALANTI, *supra* note 7, § 26.1.

121. See IND. CODE § 23-1-37-8 official cmt. (1988).

122. MODEL NONPROFIT CORP. ACT § 8.51(d), (e) (1988).

123. MODEL BUSINESS CORP. ACT ANN. § 8.51(d), (e) (1985).

124. See IND. CODE § 23-1-37-8 official cmt. (1988).

125. IND. CODE § 23-17-27-7 (Supp. 1991). It is possible that this Model Act provision was inadvertently left in the INCA.

courts will continue to recognize derivative actions by members of nonprofit corporations. Otherwise, the INCA's drafters did not just reject Professor Baker's suggestion concerning derivative actions,¹²⁶ but in fact took away a valuable right given to members of nonprofit corporations by case law. This right is extremely important in holding the managers of nonprofit corporations accountable for their conduct.

G. Rights of Nonprofit Corporation Members

The INCA defines a member to mean a person who, on more than one occasion, has the right to vote for the election of a director under the articles of incorporation or bylaws.¹²⁷ A person is not a member merely because of any rights she may have as a delegate, director, or designator of director.¹²⁸ The INCA differs from the 1971 Act in this respect. Under the 1971 Act, trustees or directors were members, along with those persons who signified their intent to be members, met the requirements of membership, and were accepted as members of the corporation.¹²⁹ A nonprofit corporation may operate through a self-perpetuating board of directors¹³⁰ or through delegates.¹³¹

Unlike prior law, the INCA and the Model Act recognize that not all nonprofit corporations will, or necessarily should, have "members" as that word is commonly used.¹³² The Model Act's drafters noted that public benefit corporations may or may not have members depending on the nature of their activities and costs.¹³³ Whether religious corporations have members generally depends on the nature of the religion: congregational religions are likely to have members, whereas hierarchical religions are not.¹³⁴ Because most people benefited by mutual benefit corporations are entitled to vote for directors, they are "members" as defined in the statute.¹³⁵

126. See *supra* note 115.

127. IND. CODE § 23-17-2-17(a) (Supp. 1991).

128. *Id.* § 23-17-2-17(b).

129. IND. CODE § 23-7-1.1-2(g) (repealed 1991).

130. IND. CODE §§ 23-17-7-3, 23-17-12-4 (Supp. 1991).

131. *Id.* §§ 23-17-9-1, -2. Some nonprofit corporations, such as professional associations, hold representative assemblies or conventions at which delegates decide organizational and policy matters. Delegates may be, or have the authority of, members, but they are not members simply because they are delegates. *Id.* §§ 23-17-2-8, -17(b)(1). Delegates also may have the powers of directors. See MODEL NONPROFIT CORP. ACT § 6.40 official cmt. (1988).

132. HONE, *supra* note 9, at xxxii-xxxiii.

133. *Id.* at xxxiii.

134. *Id.*

135. *Id.*

For all three forms of nonprofit corporation, the articles of incorporation must specify whether the corporation will have members.¹³⁶ If it does, the statutes specify the rights enjoyed by the statutory members. The INCA contains extensive provisions regulating the rights, duties, and responsibilities of the members of nonprofit corporations.¹³⁷ The INCA provisions basically track the comparable provisions of the Model Act.¹³⁸ There are, however, several significant changes from the 1971 Act. The 1971 Act required that nonprofit corporations issue membership certificates to every member.¹³⁹ The INCA eliminates this requirement; however, it does not prohibit membership certificates, and nonprofit corporations with members customarily issue certificates even though not mandated by statute.¹⁴⁰ The Model Act is also silent on membership certificates. The 1964 version of the Model Act authorized, but did not require, that nonprofit corporations issue certificates evidencing membership.¹⁴¹

Nonprofit corporations with members sometimes have problems with meetings and voting by members. Both the Model Act and INCA address these problems, although the two statutes differ in some respects. For example, the INCA authorizes members to participate in annual or special meetings by means of telecommunication devices such as conference telephone calls, whereas the Model Act is silent.¹⁴² Both statutes allow proxy voting by members,¹⁴³ but the Model Act limits the validity of a proxy to three years.¹⁴⁴ Both statutes provide that proxies are revocable, but the INCA omits Model Act provisions specifying conduct that automatically revokes a proxy appointment by a member.¹⁴⁵

136. IND. CODE § 23-17-3-2(5) (Supp. 1991); MODEL NONPROFIT CORP. ACT § 2.02(a)(5) (1988).

137. IND. CODE §§ 23-17-7-1 to -11-9 (Supp. 1991). Both statutes make it clear that as such, a member of a nonprofit corporation is not personally liable for the acts, debts, liabilities, or obligations of the corporation other than dues, assessments, or fees. The statutes also require a creditor to have obtained a final judgment against the corporation before proceeding against a member. IND. CODE §§ 23-17-7-6 to -8 (Supp. 1991); MODEL NONPROFIT CORP. ACT §§ 6.12 to -.14 (1988).

138. MODEL NONPROFIT CORP. ACT §§ 6.01 - 6.22 (1988).

139. IND. CODE § 23-7-1.1-7 (repealed 1991). The certificate was signed by the president or a vice president of the corporation and the secretary or an assistant secretary. The certificate designated the class of the member if the corporation had more than one class of members.

140. See 20 GALANTI, *supra* note 7, § 53.28.

141. MODEL NONPROFIT CORP. ACT § 11 (1964).

142. IND. CODE § 23-17-10-1(g) (Supp. 1991). The articles or bylaws must authorize this method.

143. *Id.* § 23-17-11-6; MODEL NONPROFIT CORP. ACT § 7.24 (1988).

144. MODEL NONPROFIT CORP. ACT § 7.24(b) (1988).

145. *Id.* § 7.24(e).

Many nonprofit corporations have low quorum requirements because of anticipated low membership turnout at meetings. The INCA provides that a quorum of members is ten percent of the members unless the statute, articles, or bylaws provides otherwise.¹⁴⁶ Thus, one person may be sufficient for a quorum. To prevent a few members from taking over an annual or regular meeting, the statute provides that only those matters described in the meeting notice may be voted on at an annual or regular meeting of members, unless one-third or more of the voting power is present in person or by proxy.¹⁴⁷

The INCA and the Model Act significantly change prior law by authorizing a court to set temporary rules allowing a nonprofit corporation to hold meetings of members, directors, or delegates when it otherwise would be impossible or impractical to do so. For example, in the event of an unrealistically high quorum requirement or the absence of office holders, the provisions would enable the nonprofit corporation to conduct necessary functions.¹⁴⁸

Both statutes provide for cumulative voting for electing directors,¹⁴⁹ and authorize the articles of incorporation or bylaws to provide for election on the basis of organizational unit, by region or geographic unit, preferential voting, or any other reasonable method.¹⁵⁰ As the drafters of the Model Act note, the method must be authorized in the articles or bylaws, and directors cannot be elected on an ad hoc basis.¹⁵¹

The INCA specifically provides that members may advance or loan money to the corporation, but places limits on what can be received by the member in return.¹⁵² The INCA allows the repayment of loans or advances as an exception to the prohibited distributions.¹⁵³ There are no comparable provisions in the Model Act. The INCA also allows nonprofit corporation distributions to members or affiliates that are governmental entities or to another domestic or foreign nonprofit entity provided certain financial conditions are satisfied.¹⁵⁴ These distributions can apparently be made to members of public benefit corporations and religious

146. IND. CODE § 23-17-11-4(a) (Supp. 1991).

147. *Id.* § 23-17-11-4(d).

148. *Id.* § 23-17-30-4; MODEL NONPROFIT CORP. ACT § 1.60 (1988).

149. IND. CODE § 23-17-11-7 (Supp. 1991); MODEL NONPROFIT CORP. ACT § 7.25 (1988).

150. IND. CODE § 23-17-11-7 (Supp. 1991); MODEL NONPROFIT CORP. ACT § 7.26 (1988).

151. MODEL NONPROFIT CORP. ACT § 7.26 official cmt. (1988).

152. IND. CODE § 23-17-7-9 (Supp. 1991).

153. *Id.* § 23-17-21-2(d).

154. *Id.* § 23-17-21-2(c). After the distribution, the corporation must be able to pay its debts as they become due in the usual course of the corporation's activities, and its total assets must at least equal its total liabilities.

corporations as well as to members of mutual benefit corporations. There are no comparable provisions in the Model Act.

Both the Model Act and the INCA contain extensive provisions relating to record keeping by nonprofit corporations and the right of members to inspect membership lists.¹⁵⁵ Again, the two statutes differ in significant respects. The Model Act permits members of nonprofit corporations to inspect and copy membership lists.¹⁵⁶ To prevent abuse, the Model Act places limits on the use of membership lists, but protects members by giving them access to membership lists in struggles for corporate control or internal policy disputes.¹⁵⁷ The INCA's member inspection rights¹⁵⁸ are based on the Model Act, but the inspection rights enjoyed by members of Indiana nonprofit corporations are less than those enjoyed by members of nonprofit corporations in states that follow the Model Act more closely. Again, the difference can be attributed to the IBCL because the member inspection rights under the INCA parallel the shareholder inspection rights provisions of the IBCL.¹⁵⁹

For example, the Model Act provides that a membership list prepared for a meeting must be made available beginning two business days after notice of the meeting is given,¹⁶⁰ whereas it does not have to be made available until five business days before the meeting under the INCA.¹⁶¹ Both statutes require a written demand before a member, a member's agent, or a member's attorney is entitled to inspect and copy a membership list, but *only* the Indiana statute requires that the attorney's authority be in writing.¹⁶² A claim by an "attorney at law" that he or she is a member's "agent" and that oral authorization is sufficient will not succeed because it would negate what appears to be a conscious decision of the drafters of the INCA to raise a hurdle to inspection and copying of membership lists by members of the bar. However, it

155. IND. CODE §§ 23-17-27-1 to -8 (Supp. 1991); MODEL NONPROFIT CORP. ACT §§ 16.01-16.22 (1988).

156. IND. CODE §§ 23-17-11-1(b), -27-2(b) (Supp. 1991); MODEL NONPROFIT CORP. ACT §§ 7.20, 16.02(b) (1988).

157. See HONE, *supra* note 9, at xxxvii.

158. IND. CODE §§ 23-17-11-1(b), -27-2 (Supp. 1991).

159. See generally 19 GALANTI, *supra* note 7, § 33.10.

160. MODEL NONPROFIT CORP. ACT § 7.20(b) (1988).

161. IND. CODE § 23-17-11-1(b) (Supp. 1991).

162. *Id.* § 23-17-11-1(b)(3); MODEL NONPROFIT CORP. ACT §§ 7.20 (b) (1988). The IBCL also requires that an agent seeking to examine a shareholder list be authorized in writing. IND. CODE § 23-1-30-1(b) (1988). The drafters of the INCA probably intended the same for the INCA, and the wording of the general inspection provision of the INCA seems to indicate that an agent has to be authorized in writing. IND. CODE § 23-17-27-3(a) (Supp. 1991). However, Indiana Code § 23-17-11-1(b) does not expressly require this. Of course, a cautious member of a nonprofit corporation will give written authority to an agent, as well as to an attorney, to be on the safe side.

will only be an obstacle to those lawyers who have not read the INCA. Hopefully, most Indiana practitioners will ensure that their authority is in writing. Of course, the hurdle might be more of an obstacle to attorneys from other states who might be representing nonresident members of Indiana nonprofit corporations.

Both the INCA and the Model Act provide for court-ordered inspection and copying of membership lists prepared for membership meetings.¹⁶³ However, unlike the Model Act,¹⁶⁴ the INCA does not authorize a court to "summarily" order the inspection of a list. The drafters of the IBCL also deleted summary authority from the comparable shareholder list provision of that statute.¹⁶⁵

A major difference between the two statutes is the impact of a refusal or failure to make available the list of members. The INCA provides that the unavailability of the list does not affect the validity of an action taken at a meeting.¹⁶⁶ The Model Act permits a court to invalidate a meeting after considering the equities if the corporation wrongfully refuses a member's request to inspect a membership list when the member has made a written demand to inspect and copy the list before the meeting.¹⁶⁷

In effect, the INCA's approach means that a member, challenging the stewardship of those in control of a nonprofit corporation, will have no practical remedy if he is refused access to a membership list. It is unlikely that an action could be filed, and a court could order inspection and copying, other than summarily, in the five days between the date the list was supposed to be available and the meeting date. The drafters of the INCA also deleted the provision of the Model Act authorizing a court to order a corporation that has wrongfully denied access to a membership list to pay the member's costs, including reasonable counsel fees, incurred in obtaining the order.¹⁶⁸

The articles of incorporation or bylaws of a religious corporation may limit or abolish a member's right to inspect and copy records under the INCA.¹⁶⁹ It also permits the articles of incorporation of a public benefit corporation to limit or abolish the inspection rights of members if the corporation provides a reasonable means of mailing the com-

163. IND. CODE § 23-17-11-1(d) (Supp. 1991); MODEL NONPROFIT CORP. ACT § 7.20(d) (1988).

164. MODEL NONPROFIT CORP. ACT § 7.20(d) (1988).

165. See IND. CODE § 23-1-30-1 official cmt. (1988).

166. IND. CODE § 23-17-11-1(e) (Supp. 1991).

167. MODEL NONPROFIT CORP. ACT § 7.20(e) (1988).

168. *Id.* § 7.20(d).

169. IND. CODE §§ 23-17-11-1(g), -27-2(e) (Supp. 1991); MODEL NONPROFIT CORP. ACT §§ 7.20(f), 16.02(e) (1988).

munications of a member concerning the corporation, at that member's expense, to other members.¹⁷⁰ There is no comparable provision in the Model Act. The alternative authorized by the INCA not only denies a member effective access to other members in a battle for control, but also gives those in control of the nonprofit corporation information concerning issues being raised by a disgruntled member. One can only wonder if the drafters of the INCA feared a massive onslaught of hostile takeover attempts of Indiana nonprofit corporations.

The INCA also expressly subjects a member's right to inspect and copy a membership list prepared for a meeting to the requirements of the general inspection right provisions of the statute.¹⁷¹ The statute grants general inspection rights to members of nonprofit corporations.¹⁷² A member exercising those rights must describe with reasonable particularity the purpose for the inspection and which records are sought.¹⁷³ The Model Act provides that the demand requirements of the general inspection rights provision does not apply to inspection of membership lists prepared in connection with a meeting.¹⁷⁴

Both statutes limit the use of a membership list obtained under the general inspection rights provisions of the statutes. Although the INCA makes the limitation express with respect to lists obtained in connection with a meeting, the limitation is only implicit in the Model Act.¹⁷⁵

H. Corporate Purposes

The INCA differs from the 1971 Act with respect to the purposes of nonprofit corporations. The 1971 Act specified that a not-for-profit corporation could be organized for any lawful purposes consistent with the statute.¹⁷⁶ The 1964 version of the Model Act included a nonexclusive list of examples of corporate purposes.¹⁷⁷ The current Model Act resolves the "corporate purposes" debate by providing that every corporation has the purpose of engaging in any lawful activity unless a more limited

170. IND. CODE §§ 23-17-11-1(h), -27-2(f)(2) (Supp. 1991).

171. *Id.* § 23-17-11-1(b).

172. *Id.* § 23-17-27-2.

173. *Id.* § 23-17-27-2(c)(2).

174. MODEL NONPROFIT CORP. ACT § 16.02(d)(1) (1988). The INCA seems to suffer from a slight circularity problem in this respect. Indiana Code § 23-17-11-1(b) subjects the right to inspect and copy a membership list prepared for a meeting to § 23-17-27-2(c), but § 23-17-27-2(d)(1) provides that § 23-17-27-2 does not affect the rights of a member to inspect records under § 23-17-11-1.

175. IND. CODE § 23-17-11-1(b) (Supp. 1991). *See* MODEL NONPROFIT CORP. ACT § 7.20 official comment (1988).

176. IND. CODE § 23-7-1.1-3 (repealed 1991).

177. *See* HONE, *supra* note 9, at xx-xxi.

purpose is set forth in the articles of incorporation.¹⁷⁸ The INCA follows this approach.¹⁷⁹ Unlike the Model Act, but like the IBCL, the INCA provides that a corporation engaging in an activity subject to regulation under another Indiana statute may incorporate under the statute unless provisions for incorporation exist under the other statute.¹⁸⁰

The INCA authorizes challenges to a corporation's power to act in certain circumstances, but this authority differs from the Model Act in two major respects. Both statutes authorize the attorney general to bring an action to enjoin an act when no third party brings suit.¹⁸¹ The INCA, on its face, goes further by authorizing a declaratory judgment action challenging a nonprofit corporation's power to act.¹⁸² However, the Model Act authorizes a challenge to a corporation's power to act in a proceeding against an incumbent or former director, officer, employee, or agent of the corporation. It is possible for a nonprofit corporation to be liable to a third party on an ultra vires contract, and the Model Act allows an action for damages against the person or persons responsible for the ultra vires activity.¹⁸³ The INCA does not authorize such an action. The decision to omit this action against corporate personnel generally will not be significant because of the infrequency of ultra vires conduct, although ultra vires actions might be more common with nonprofit corporations than business corporations. The omission is significant as evidence of the drafters' intent to eliminate, or at least seriously curtail, the right of members of nonprofit corporations to bring derivative actions.

I. Effect on Existing Corporations

The 1971 Act did not automatically apply to existing corporations. Rather, the statute permitted not-for-profit corporations, which could be formed under the 1971 Act, but were organized under other Indiana laws, to elect to become subject to the statute by filing articles of acceptance or by amending the articles of incorporation or similar gov-

178. MODEL NONPROFIT CORP. ACT § 3.01(a) (1988).

179. IND. CODE § 23-17-4-1(a) (Supp. 1991).

180. *Id.* § 23-17-4-1(b). The Model Act provides for incorporation under its provisions only if incorporation is not prohibited under other statute. MODEL NONPROFIT CORP. ACT § 3.01(b) (1988).

181. IND. CODE § 23-17-4-4(b) (Supp. 1991); MODEL NONPROFIT CORP. ACT § 3.04(b) (1988). The INCA's drafters consciously omitted the Model Act's provision allowing members to challenge ultra vires acts in a derivative proceeding.

182. IND. CODE § 23-17-4-4(b) (Supp. 1991). It is not clear if the requirement that a third person not have acquired rights before injunctive relief is available also applies to declaratory judgment actions. Allowing declaratory judgment actions even when a third person has acquired rights is justifiable in order to resolve any issues of a nonprofit corporation's power to act.

183. MODEL NONPROFIT CORP. ACT § 3.04(c) (1988).

erning instrument to declare that the corporation was to governed by the statute.¹⁸⁴ The Model Act contemplates that the statute will apply to existing nonprofit corporations if the statute under which the corporation was incorporated includes a clause reserving the power to amend or repeal the statute. The Model Act also contains an optional provision that allows nonprofit corporations to decide whether to be governed by the provisions of the Model Act or the statute under which they were organized.¹⁸⁵ The drafters of the Model Act observed that most not-for-profit acts adopted in this century have a reserved powers clause, but that some nonprofit corporations could have been formed under statutes without such clauses or could be religious corporations formed under special statutes.¹⁸⁶

The application of the INCA to new and existing nonprofit corporations differs. The INCA applies to all nonprofit corporations organized after its effective date of August 1, 1991.¹⁸⁷ It also permits nonprofit corporations existing on July 31, 1991, to "opt in" to the new statute by corporate action.¹⁸⁸ However, unlike the Model Act, the INCA does not give nonprofit corporations the choice of being governed by the laws under which they were organized. Rather, the new statute will apply to all corporations in existence on July 31, 1993, organized under *or subject to* the 1971 Act or its predecessor, the General Not-for-Profit Act of 1935.¹⁸⁹ This approach is similar to the ICBL's approach to existing business corporations.¹⁹⁰ There is a potential problem here in that the 1971 Act did not contain a reserved powers clause.¹⁹¹ Thus, it is conceivable that a court would refuse to apply the INCA to existing nonprofit corporations if, for example, the new statute is less favorable to the interests of members than was the 1971 Act. The INCA applies to foreign nonprofit corporations desiring to transact business in Indiana after July 31, 1993.¹⁹² A foreign nonprofit corporation authorized to transact business in Indiana on that date is not required to obtain a new certificate.¹⁹³

184. IND. CODE § 23-7-1.1-37 (repealed 1991).

185. MODEL NONPROFIT CORP. ACT § 17.01(b) (1988).

186. *Id.* § 17.01 official cmt.

187. IND. CODE §§ 23-17-1-1, -2 (Supp. 1991).

188. *Id.* § 23-17-1-1(b).

189. *Id.* § 23-17-1-1(b).

190. *Id.* § 23-1-17-3.

191. Unlike the Model Act, the INCA does not contain a reserved powers clause. However, a "universal" reserved powers clause was added to the Indiana Code in 1986. See IND. CODE § 1-1-5-2 (1988). See generally 17 GALANTI, *supra* note 7, § 8.3.

192. IND. CODE § 23-17-1-4 (Supp. 1991).

193. *Id.*

J. Amendment of Articles and Bylaws

The provisions of the Model Act and the INCA relating to amending articles of incorporation are similar.¹⁹⁴ These provisions are more detailed than the comparable provisions in the 1971 Act¹⁹⁵ in that the current statute distinguishes among the three types of nonprofit corporations. Both the Model Act and the INCA allow provisions giving third persons the right to approve articles of incorporation and bylaw amendments.¹⁹⁶ The INCA adopts the optional Model Act provision authorizing public benefit corporations and mutual benefit corporations to terminate all members or any class of members by amending the articles of incorporation.¹⁹⁷ In effect the INCA allows "going-private" transactions.

The INCA and Model Act provisions regulating bylaw amendments of nonprofit corporations are also more detailed than those of the prior generation of statutes for the same reason.¹⁹⁸ However, the members of Indiana nonprofit corporations have fewer rights with respect to bylaw amendments than those provided by the Model Act. The INCA provides that the board of directors may amend or repeal the bylaws of a nonprofit corporation unless the articles of incorporation, the bylaws, or the statute provide otherwise.¹⁹⁹ The articles of incorporation may require that a specified person other than the board of directors approve in writing a bylaw amendment.²⁰⁰ The incorporators have the power to amend or repeal the bylaws until the directors have been chosen.²⁰¹ This power to amend or repeal bylaws is subject to the class voting rules in certain

194. *Id.* §§ 23-17-17-1 to -11; MODEL NONPROFIT CORP. ACT §§ 10.01-10.08 (1988).

195. IND. CODE §§ 23-7-1.1-23 to -28 (repealed 1991).

196. IND. CODE § 23-17-17-1 (Supp. 1991); MODEL NONPROFIT CORP. ACT § 10.30 (1988).

197. IND. CODE § 23-17-17-2 (Supp. 1991). Directors must meet their fiduciary obligations if they decide that the corporation should have a self-perpetuating board of directors by eliminating members. MODEL NONPROFIT CORP. ACT § 10.31 official cmt. (1988)

198. IND. CODE §§ 23-17-18-1, -2 (Supp. 1991); MODEL NONPROFIT CORP. ACT §§ 10.20-10.22 (1988).

199. IND. CODE § 23-17-18-1(a) (Supp. 1991). Indiana Code § 23-17-18-1(b)(1) requires notice of a directors meeting at which bylaw amendments are to be approved. This probably means notice to the directors and not to the members. The provision requires that notice be in accordance with § 23-17-15-2(c). The reference probably should be to § 23-17-15-3(c), which relates to calling and giving notice of director meetings. Indiana Code § 23-17-15-2(c) relates to the effect of a consent of directors to action taken without a meeting. The comparable cross-reference in the Model Act is to the call and notice provision. MODEL NONPROFIT CORP. ACT §§ 8.22(c), 10.20 (1988).

200. IND. CODE § 23-17-17-1 (Supp. 1991); MODEL NONPROFIT CORP. ACT § 10.30 (1988).

201. IND. CODE § 23-17-18-1(a) (Supp. 1991); MODEL NONPROFIT CORP. ACT § 10.20 (1988).

circumstances, in which members are entitled to vote on bylaw amendments.²⁰²

The drafters of the Model Act note that bylaws of a nonprofit corporation setting forth the rights and duties of members are analogous to the provisions in the articles of incorporation of business corporations relating to preference shares.²⁰³ Consequently, for nonprofit corporations with members, the Model Act not only permits members to initiate bylaw amendments, but also requires member approval of all bylaw changes.²⁰⁴

The drafters of INCA departed significantly from this structure by vesting the authority to amend bylaws in the directors and by permitting member-initiated bylaw amendments only if the articles of incorporation or bylaws give members this right.²⁰⁵ Members are only required to approve bylaw amendments adopted by the directors when the amendment will change the members' rights.²⁰⁶ This approach is similar to the bylaw provisions of the IBCL. The IBCL eliminated the inherent power of shareholders to amend or repeal bylaws of business corporations that the RMBCA recognizes.²⁰⁷ Bylaw flexibility resulting from the directors' right to amend bylaws may be desirable in the for-profit sector, but the wisdom of circumscribing the rights of members of nonprofit corporations with respect to bylaws is far from clear.

The INCA does not totally deprive members of the right to vote on bylaw amendments, and members of nonprofit corporations can vote on bylaw amendments in certain cases.²⁰⁸ These voting rights exist even when the articles of incorporation and bylaws provide otherwise.²⁰⁹ The right depends on the type or nature of the nonprofit corporation. The members of a class of a religious corporation may vote as a separate

202. IND. CODE § 23-17-18-2 (Supp. 1991); MODEL NONPROFIT CORP. ACT § 10.22 (1988).

203. MODEL NONPROFIT CORP. ACT § 10.21 official cmt. (1988).

204. *Id.* § 10.21(a).

205. IND. CODE § 23-17-18-1 (Supp. 1991).

206. *Id.* § 23-17-18-2.

207. See IND. CODE § 23-1-39-1 official cmt. (1988). See generally 19 GALANTI, *supra* note 7, § 39.15 (1991).

208. The members of a class in a public benefit corporation may vote as a separate voting group on a proposed amendment to the bylaws if the amendment would affect the class's voting rights differently from those of another class. The members of a class in a mutual benefit corporation may vote as a separate voting group on a proposed amendment to the bylaws that substantially affects the rights, privileges, preferences, restrictions, or conditions of the class. Members of a class of a religious corporation may vote as a separate voting group on a proposed amendment to the bylaws only if a class vote is provided for in the articles of incorporation or the bylaws. IND. CODE § 23-17-18-2 (Supp. 1991).

209. *Id.* § 23-17-18-2(e).

voting group on a proposed amendment to the bylaws only if a class vote is provided for in the articles of incorporation or bylaws.²¹⁰

The Model Act provides that if a class of members is to be divided into two or more classes as a result of a bylaw amendment, the amendment must be approved by the members of each class that would be created by the amendment.²¹¹ The Model Act also specifies that an amendment be approved by the members of the class by the lesser of two thirds of the vote cast or a majority of the votes castable by the class.²¹²

The INCA provides that if a class of members is to be divided into at least two classes by an amendment *and* a class vote is required to approve an amendment to the bylaws, an amendment must be approved only by a *majority of the votes cast* by the members of each class that would be created by the amendment.²¹³ The provision gives less protection to the members of a class in this situation than does the Model Act because a majority of the votes cast can be substantially less than a majority of the class. A small group of members may be able to cause a major change to the structure of a nonprofit corporation. This also is possible under the Model Act, but the risks are reduced by the requirement that at least two-thirds of the votes cast approve the amendment.

K. Emergency Powers

The Model Act and the INCA both grant emergency powers to the board of directors of nonprofit corporations.²¹⁴ This authority was not common under the previous generation of nonprofit corporations. However, the definition of emergency is broader under the INCA than under the Model Act. The INCA uses the IBCL definition of emergency, that is, an extraordinary event that prevents a quorum from assembling.²¹⁵ The Model Act defines an emergency in terms of a "catastrophic" event.²¹⁶ The purpose of the IBCL language was to allow the board of

210. *Id.* § 23-17-18-2(c).

211. MODEL NONPROFIT CORP. ACT § 10.22(d) (1988).

212. *Id.* § 10.22(e).

213. IND. CODE § 23-17-18-2(d) (Supp. 1991). Presumably, a simple majority of the votes cast will also suffice to approve any other bylaw amendment that requires member approval, although the statute is silent on this point.

214. *Id.* § 23-17-4-3; MODEL NONPROFIT CORP. ACT § 3.03 (1988). For example, in an emergency, lines of succession can be modified to accommodate the incapacity of any director, officer, employee, or agent, and the corporation can relocate its principal office, designate alternative principal offices or regional offices, or authorize an officer to do so.

215. IND. CODE § 23-17-4-3(d) (Supp. 1991).

216. MODEL NONPROFIT CORP. ACT § 3.03(d) (1988).

directors to react to any untoward event such as a hostile takeover attempt.²¹⁷ The approach of the Model Act, and the comparable RMBCA provision,²¹⁸ is to permit a corporation to act in the event directors are killed in an event such as a plane crash or a war.²¹⁹ Both statutes also authorize a nonprofit corporation to adopt "emergency bylaws" unless the articles of incorporation provide otherwise.²²⁰ Again, the INCA definition of emergency for triggering emergency bylaws is couched in terms of an extraordinary event.²²¹ Corporate action taken in good faith during an emergency to further the ordinary affairs of a corporation binds the corporation and may not be used to impose liability on a corporate director, officer, employee, or agent.²²²

L. Dissolution

The INCA contains detailed provisions relating to general dissolution,²²³ judicial or involuntary dissolution,²²⁴ and administrative dissolution²²⁵ of nonprofit corporations. Again, these provisions are similar to the comparable provisions of the IBCL.²²⁶ The INCA gives less protection to the interests of claimants against a dissolved nonprofit corporation than does the Model Act.²²⁷

Distribution of assets when business corporations dissolve rarely presents problems even in the absence of provisions in the articles or bylaws relating to such matters. However, the nature and goals of nonprofit corporations require special handling of corporate assets upon dissolution.²²⁸ It was uncertain under statutes such as the 1971 Act who would receive assets of a dissolved nonprofit corporation if the articles

217. IND. CODE § 23-1-22-3(d) (1988). See generally 17 GALANTI, *supra* note 7, § 10.22.

218. MODEL BUSINESS CORP. ACT ANN. § 3.03(d) (1985).

219. See *id.* § 3.03 official cmt.

220. IND. CODE § 23-17-3-9 (Supp. 1991); MODEL NONPROFIT CORP. ACT § 2.07 (1988).

221. IND. CODE § 23-17-3-9(d) (Supp. 1991).

222. *Id.* § 23-17-4-3(c)(2); MODEL NONPROFIT CORP. ACT § 3.03(c)(2) (1988).

223. IND. CODE §§ 23-17-22-1 to -7 (Supp. 1991).

224. *Id.* §§ 23-17-24-1 to -4.

225. *Id.*

226. See generally 20 GALANTI, *supra* note 7, §§ 44.1-44.30.

227. For example, a claimant has five years under the Model Act to bring an action if a nonprofit corporation has published notice of dissolution, while only two years is allowed by the INCA. IND. CODE § 23-17-22-7(c) (Supp. 1991); MODEL NONPROFIT CORP. ACT § 14.08 (c) (1988).

228. See HONE, *supra* note 9, at xxxiv. An existing nonprofit corporation might have to amend its articles of incorporation to remain a public benefit corporation. MODEL NONPROFIT CORP. ACT § 17.07 official cmt. (1988).

or bylaws did not specify a distribution plan. The INCA eliminates this problem by requiring the articles to include provisions for the distribution of corporate assets.²²⁹ The articles of incorporation do not have to state to whom assets will be distributed on dissolution as long as they provide how to resolve the issue.²³⁰

M. Foreign Corporations

Like the 1971 Act, the INCA contains provisions on how foreign not-for-profit corporations are to procure certificates of admission from the secretary of state before transacting business in Indiana.²³¹ The INCA generally tracks the provisions of the IBCL regulating the admission of foreign business corporations wishing to transact business in Indiana.²³² The INCA follows the contemporary approach of not attempting an affirmative definition of what constitutes transacting business. Rather, it defines the concept in negative terms, by specifying what activities do *not* constitute transacting business.²³³

The prime sanction against a foreign nonprofit corporation that transacts business without a certificate of authority is to deny the corporation access to Indiana courts until it is qualified.²³⁴ The INCA also continues the sanction of the 1971 Act and subjects a foreign corporation to a penalty not exceeding ten thousand dollars.²³⁵ The INCA eliminated the minor criminal penalty against agents of unqualified foreign nonprofit corporations.²³⁶

A foreign nonprofit corporation with a valid certificate of authority has the same rights and enjoys the same privileges as domestic nonprofit corporations, and except as otherwise provided by the INCA, is subject to the same duties, restrictions, penalties, and liabilities as domestic nonprofit corporations.²³⁷ The INCA expressly provides that the statute does not authorize Indiana to regulate the organization or internal affairs of qualified foreign corporations.²³⁸ The Model Act is similar.²³⁹

229. IND. CODE § 23-17-3-2(6) (Supp. 1991). The Model Act is similar. MODEL NONPROFIT CORP. ACT § 2.02(a)(6) (1988).

230. HONE, *supra* note 9, at xxxiv. For example, the articles can specify the name of the organization or organizations to receive the assets or state that a particular individual, organization, or the board of directors will determine who will receive the assets.

231. IND. CODE §§ 23-7-1.1-48 to -60 (repealed 1991).

232. IND. CODE §§ 23-1-49-1 to -51-3 (1988).

233. IND. CODE § 23-17-26-1(b) (Supp. 1991).

234. *Id.* § 23-17-26-2.

235. *Id.* § 23-17-26-2(d). See IND. CODE § 23-7-1.1-60(a) (repealed 1991).

236. IND. CODE § 23-7-1.1-60(c) (repealed 1991). There are no reported decisions imposing sanctions on a foreign not-for-profit corporation or its agents.

237. IND. CODE § 23-17-26-5 (Supp. 1991).

238. *Id.* § 23-7-26-5(c).

239. MODEL NONPROFIT CORP. ACT § 15.05(c) (1988).

III. CONCLUSION

By this time, the reader will have realized that the author views the INCA with mixed emotions. I am on record as having qualms with the tilt of the IBCL in favor of the interests of corporate management and against the interests of shareholders of Indiana business corporations, although I recognize that corporate managers do have rights and interests that should be protected.²⁴⁰ To whatever extent favoring management of business corporations is justified in our global economy, it is not clear that the same tilt is justified with nonprofit corporations. Obviously, my concern is with the wholesale incorporation of IBCL substantive provisions into the INCA. This Article points out some of the features of the INCA that might be questionable or problematic. Whether or not readers agree with this position, all can agree that the INCA is a significant development and that Indiana nonprofit corporations are now regulated by one of the most modern, flexible, state of the art nonprofit corporation statutes found in any jurisdiction.

240. See 18 GALANTI, *supra* note 7, § 25.2.

Indiana Adds Articles 2A and 4A of Uniform Commercial Code

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During the past two decades, the Uniform Commercial Code (U.C.C.), which became part of Indiana law in 1963,¹ has undergone major study and revision by its sponsors, the National Conference of Commissioners on Uniform State Laws and the American Law Institute. Twenty years ago, the sponsors made major revisions to Article 9—Secured Transactions and made corresponding changes in other Articles, all of which became part of Indiana's version of the U.C.C. in 1986.² More recently, the sponsors have drafted two completely new Articles, 2A—Leases and 4A—Fund Transfers (the subjects of this Article), have made major revisions in Articles 3—Negotiable Instruments and 4—Bank Collections,³ and have recently appointed a drafting committee to review and redraft Article 2—Sales.⁴

In 1991, the legislature added the two new Articles to the Indiana version of the U.C.C. as Chapters 2.1—Leases and 4.1—Funds Transfers and made corresponding changes in sections of the current Code which are affected by these additions.⁵ Chapter 2.1, which deals with leases of goods, is virtually identical to the 1990 Official Text of Article 2A.⁶

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1. 1963 Ind. Acts ch. 317. The U.C.C. appears at IND. CODE §§ 26-1-1-101 to -10-106 (1988 & Supp. 1991). Hereafter, reference to sections of the U.C.C. will be to the generic section numbers rather than to the Indiana Code section numbers, e.g., § 1-201(37) rather than § 26-1-1-201(37), unless the Indiana Code differs significantly from the 1991 U.C.C. Official Draft.

2. See 1985 Ind. Acts 769-830.

3. See U.C.C. Rev. Art. 3 prefatory note, 2 U.L.A. 7-8 (Supp. 1991).

4. See Fred H. Miller, *The UCC Today: Revisions, Planned Revisions, and State Enactments*, UCC BULL. No. 1, 1-2 (Jan. 1992).

5. 1991 Ind. Acts 2800-88. These new chapters appear at IND. CODE §§ 26-1-2.1 and 26-1-4.1 (Supp. 1991). As indicated *supra* note 1, reference to sections of these new chapters will be to the generic U.C.C. citation, 2A, rather than to the Indiana citation, § 1-26-2.1, unless the Indiana version differs significantly from the U.C.C. Official Draft.

6. Article 2A was originally promulgated in 1987. See U.C.C. Article 2A foreword, 1B U.L.A. 648-49 (1989); Amelia H. Boss, *The History of Article 2A: A Lesson for Practitioner and Scholar Alike*, 39 ALA. L. REV. 575 (1988). After much study and commentary, e.g., Corinne Cooper, *Identifying a Personal Property Lease Under the UCC*, 49 OHIO ST. L.J. 195 (1988); Robert D. Strauss & Lawrence F. Flick, II, *Leases*, 46 BUS.

As of fall 1991, Indiana was one of at least nineteen states to have adopted Article 2A.⁷ Chapter 4.1, which deals with major electronic funds transfers, is virtually identical to the 1989 Official Text of Article 4A.⁸ Indiana is one of at least twenty-eight states to have enacted that Article.⁹

A complete analysis of the two new chapters would require a book-length work.¹⁰ This Article will principally highlight the manner in which Chapter 2.1 (Article 2A) affects or changes the law of Indiana with some additional comment about Chapter 4.1 (Article 4A).

LAW. 1509 (1991); Symposium, *Article 2A of the Uniform Commercial Code*, 39 ALA. L. REV. 559 (1988) (an excellent collection of 10 scholarly articles on the 1987 version of Article 2A plus the Report of the U.C.C. Committee of the Business Law Section of the State Bar of California), the drafters substantially amended both text and official comments in 1990. See U.C.C. § 2A-101 official cmt., 1B U.L.A. 44 (Supp. 1991). The Indiana Legislature enacted the 1990 version. The only major textual differences which the author and his research assistant discovered in proofreading the 1990 Official Text against the Indiana enactment relate to gender references or Indiana's own statutory citation references. Neither of these differences affect the substance of the legislation. Compare, e.g., U.C.C. § 2A-405(b) ("If the causes mentioned in *paragraph* (a) affect only part of the lessor's or the supplier's capacity to perform, *he [or she]* shall allocate production and deliveries among *his [or her]* customers . . .") with IND. CODE § 26-1-2.1-405(b) (Supp. 1991) ("If the causes mentioned in *subdivision* (a) affect only part of the lessor's or the supplier's capacity to perform, *the lessor or supplier* shall allocate production and deliveries among *the lessor's or supplier's* customers . . .").

7. See U.C.C. Rep. Serv. (Callaghan), State Correlation Tables, Table of State Enactments of 1987 Amendments (Article 2A) xiii (1991). The table lists Indiana, California, Colorado, Florida, Hawaii, Kansas, Kentucky, Minnesota, Montana, Nebraska, Nevada, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Virginia, and Wyoming. The effective dates vary from November, 1988 (Oklahoma) to July, 1993 (North Dakota).

8. See IND. CODE ANN. §§ 26-1-4.1-101 to -507, Historical and Statutory Notes (West Supp. 1991). All of the sections of Chapter 4.1 are noted as being "identical with" those of Article 4A of the Uniform Commercial Code, except for § 26-1-4.1-205, which is noted as "similar to" § 4A-205. The only real difference between the two sections is Indiana's use of the word "obligated" in place of the U.C.C.'s use of "obliged."

9. See U.C.C. Rep. Serv. (Callaghan), State Correlation Tables, Table of State Enactments of 1989 Amendments (Article 4A) xvii (1991).

10. See *infra* notes 90-92 and accompanying text (indicating that Article 2A is essentially a modification and expansion of Article 2—Sales for application to lease transactions). Several books deal only with Article 2, and some are limited even further to specific topics within the article. See, e.g., BARKLEY CLARK & CHRISTOPHER SMITH, *THE LAW OF PRODUCT WARRANTIES* (1984); HAROLD GREENBERG, *RIGHTS AND REMEDIES UNDER U.C.C. ARTICLE 2* (1987); ROBERT J. NORDSTROM, *HANDBOOK OF THE LAW OF SALES* (1970); GEORGE I. WALLACH, *THE LAW OF SALES UNDER THE UNIFORM COMMERCIAL CODE* (1981 Supps.); DOUGLAS J. WHALEY, *WARRANTIES AND THE PRACTITIONER* (1981).

I. ARTICLE 2A—LEASES

A. *Background*

Since the promulgation of the first official text of the U.C.C. in 1951¹¹ and Indiana's adoption of the Code in 1963,¹² equipment leasing has become a major part of the United States economy.¹³ The reasons for this growth are many, although the most prominent include the lessee's reduced cash outlay when equipment is leased rather than purchased, some favorable tax consequences for the lessee, and the lessor's apparently favorable position in the event of a lessee's bankruptcy. These are of particular importance in times of economic difficulties.¹⁴

Despite this tremendous growth, the development of law specifically applicable to leasing was something of a patchwork that depended to a great extent on the common law of bailment and occasional analogy to the law of sales in the Code's Article 2. In the process of codifying the law of leases, the drafters perceived three basic issues to be resolved, none of which was clear under then existing law: (1) Is the transaction a lease or a security interest? (2) Has the lessor made any warranties to the lessee? and (3) What are the remedies available when the lessee (or the lessor) is in default?¹⁵ If the response to the first question is that the transaction creates a security interest rather than a lease, the "lessor" is required to comply with the secured transactions provisions of the Code's Article 9 in order to protect her interest in the goods with respect to both the "lessee" and third parties. If the transaction creates a lease, Article 9 does not apply. As to questions 2 and 3, the warranty and remedies provisions of Article 2 apply directly to sales, not to leases, and the Article 9 provisions on warranties and remedies apply only to secured transactions. If the transaction is a secured trans-

11. See U.C.C., General Comment of the N.C.C.U.S.L. and the A.L.I., 1 U.L.A. xv (1989).

12. See *supra* note 1.

13. See, e.g., Boss, *supra* note 6, at 576-77. Professor Boss, one of the leading scholars in this field, notes that by 1988, approximately one-third of all new equipment in the United States was leased and that leasing has become a multi-billion dollar industry. *Id.*

14. See *id.*

15. See U.C.C. § 2A-101 official cmt. The official comments, although not enacted by any legislature, including that of Indiana, are the product of the drafters of the Code and constitute the first line of interpretation of the meaning of the Code's language. This is particularly true of Article 2A. See Donald J. Rapson, *Deficiencies and Ambiguities in Lessors' Remedies under Article 2A: Using Official Comments to Cure Problems in the Statute*, 39 ALA. L. REV. 875 (1988). The official comments do not appear in the Indiana Code or the Burns Indiana Statutes Annotated, but are reproduced in West's Annotated Indiana Code.

action, the rights and duties of both "lessor" and "lessee" are governed by Article 9, and if a sale is involved, also by Article 2. If the transaction is a lease, the answers are uncertain.¹⁶

During the drafting process, the drafters borrowed extensively from Article 2 and in some instances carried over entire sections with changes made only to reflect the differences between sales and leases. Thus, decisions interpreting Article 2 may be helpful or even persuasive in applying similar provisions of Article 2A.¹⁷ As persons familiar with Article 2 well know, that Article is far from perfect. Problems with some of its provisions have arisen since its promulgation forty years ago, and the Article is, at the present time, itself the subject of study by the Code's sponsors.¹⁸ However, the drafters of Article 2A elected not to remedy the Article 2 problems when incorporating Article 2 provisions into Article 2A unless absolutely compelled to do so.¹⁹ This being so, if and when Article 2 is revised, it will be necessary to make corresponding modifications or amendments to Article 2A.

In addition to codifying the rules relating to the formation of leases and the rights, duties, and remedies of the parties, including some third parties, the drafters of Article 2A attempted to clarify the distinction between leases and other transactions by redefining the line between leases and secured transactions and by establishing a new definition of "finance lease,"²⁰ which also helps in distinguishing a true lease from a secured transaction. The drafters' ultimate success in drawing these lines can be judged only over time.

B. The Definitions

1. Lease or Secured Transaction.—One of the most difficult and

16. See U.C.C. § 2A-101 official cmt.

17. *Id.*

18. See Boss, *supra* note 6, at 600-04; Edwin E. Huddleson, III, *Old Wine in New Bottles: UCC Article 2A—Leases*, 39 ALA. L. REV. 615, 620-21 (1988); Homer Kripke, *Some Dissonant Notes about Article 2A*, 39 ALA. L. REV. 791, 792-93 (1988). In fact, the drafting of Article 2 began more than 50 years ago as a revision of the Uniform Sales Act of 1905. See Harold Greenberg, *Specific Performance under Section 2-716 of the Uniform Commercial Code: "A More Liberal Attitude" in the "Grand Style,"* 17 NEW ENG. L. REV. 321, 327-30 (1982).

19. See U.C.C. Art. 2A foreword, 1B U.L.A. 649 (1991); Peter A. Alces, *Surreptitious and Not-So-Surreptitious Adjustment of the UCC: An Introductory Essay*, 39 ALA. L. REV. 559, 566 (1988); Boss, *supra* note 6, at 601; Steven L. Harris, *The Rights of Creditors Under Article 2A*, 39 ALA. L. REV. 803, 816-17 n.48 (1988) (The drafters generally adhered "to the 'gag rule': the provisions of Article 2 would be followed unless they were so bad that they caused one to gag.").

20. U.C.C. § 2A-103(1)(g). See the discussion of finance leases, *infra* notes 30-34 and accompanying text.

controversial problems prior to the promulgation of Article 2A was the actual task of distinguishing between leases and secured transactions.²¹ Consequently, an important part of the new Article 2A package is the substantial expansion of the Article 1 definition of "security interest" in section 1-201(37)²² from a single paragraph to a multi-paragraph, subsectioned provision roughly five times as long.²³ The new definition is much more detailed and attempts to draw a clear distinction between a security interest or lease intended as security, which is governed by Article 9 (and Article 2 if a sale is also involved) and a true lease, which is governed by Article 2A. As noted by the drafters, if the transaction is a lease, the lessee's interest is possessory only. The residual interest belongs to the lessor who need not file a financing statement, but whose ownership of the goods is protected against the lessee's creditors and a trustee in bankruptcy.²⁴ Thus, the determination of whether the transaction is a lease or security interest is the first step in any analysis.

The focus of the definition is on the facts and economics of the transaction, rather than on the specific intent of the parties. As stated by the drafters:

Reference to the intent of the parties to create a lease or security interest has led to unfortunate results. In discovering intent,

21. See, e.g., Amelia H. Boss, *Panacea or Nightmare? Leases in Article 2*, 64 B.U. L. REV. 39 (1984); Amelia H. Boss, *Leases & Sales: Ne'er or Where Shall the Twain Meet?*, 1983 ARIZ. ST. L.J. 357; Peter F. Coogan, *Is There a Difference Between a Long-Term Lease and an Installment Sale?*, 56 N.Y.U. L. REV. 1036 (1983); Cooper, *supra* note 6.

22. Article 1 of the U.C.C., IND. CODE § 26-1-1 (1988), contains general provisions which are applicable to the entire Code.

23. Compare IND. CODE § 26-1-1-201(37) (1988) (old § 1-201(37)) with IND. CODE § 26-1-1-201(37) (Supp. 1991) (new § 1-201(37)). Until the 1991 revision, the section stated: (37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer . . . is limited in effect to a reservation of a security interest. . . . Unless a lease or consignment is intended as security, reservation of title thereunder is not a security interest but a consignment is in any event subject to the provisions on consignment sales Whether a lease is intended as a security interest is to be determined by the facts of each case. However:

(a) the inclusion of an option to purchase does not of itself make the lease one intended for security; and

(b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

The relevant portions of the definition in new § 1-201(37) are discussed in the text which follows this note.

24. U.C.C. § 1-201(37) official cmt. 37.

courts have relied upon factors that were thought to be more consistent with sales or loans than leases. Most of these criteria, however, are as applicable to true leases as to security interests. Examples include the typical net lease provisions, a purported lessor's lack of storage facilities or its character as a financing party rather than a dealer in goods. Accordingly, amended Section 1-201(37) deletes all reference to the parties' intent.²⁵

The most important factor that distinguishes a true lease from a sale or loan is whether there is a meaningful residual interest in the goods at the conclusion of the lease term, followed by the determination of who is entitled to that interest. If a meaningful residual interest remains in the lessor at the end of the lease term, the transaction is a lease. If that residual interest is in someone other than the lessor because the lessee may acquire the goods at little or no additional cost or there is no residual interest at all because the goods have no remaining economic life, it is a secured transaction.²⁶ Accordingly, the Code states a definition of "secured transaction" based upon where the residual interest in the goods will be at the end of the transaction as a matter of economic reality.

Pursuant to new section 1-201(37), a transaction in the form of a lease nevertheless creates a security interest as a matter of law if two requirements are met: (1) the lessee's obligation to pay is not subject to termination by her during the term of the lease and (2) any one of the following is present: (a) the original term equals or exceeds the remaining economic life of the goods; (b) the lessee is required to renew for the remaining economic life of the goods or to become their owner; (c) the lessee has an option to renew for the remaining economic life of the goods either for no consideration or for nominal consideration; or (d) the lessee has an option to buy the goods either for no consideration or for nominal consideration.²⁷ Underlying these requirements is the idea that if the nature of the transaction at its inception is such that the lessee, in the ordinary course of events and as a matter of practical economics, must become the owner of the goods at the end of the lease period, or that there will be no residual economic value to the lessor at the end of the lease, the transaction is a sale and secured transaction rather than a lease. Conversely, if the lessee may terminate the lease or the lease will expire at a time before practical economics clearly dictate that she become the owner of the goods, the transaction is a lease.

25. *Id.*

26. See Cooper, *supra* note 6, at 208, 234; Huddleson, *supra* note 18, at 626.

27. U.C.C. § 1-201(37).

The section also lists five provisions that do not create a secured transaction merely because they are present in the lease. These provisions are: (a) that the present value of the lessee's total payments equals or exceeds the market value of the goods at the time of the lease; (b) that the lessee assumes the risk of loss or agrees to pay taxes, insurance, registration fees, or service or maintenance costs; (c) that the lessee has an option to renew or to buy the goods; (d) that the lessee has an option to renew for a rent that equals or exceeds the reasonably predictable fair market rent at the time the option is to be exercised; and (e) that the lessee has an option to buy at a price that equals or exceeds the reasonably predictable fair market value at the time the option is to be exercised.²⁸ The drafters noted that although these factors are used by courts in determining the intent of the parties, these factors are as applicable to a true lease as they are to a secured transaction.²⁹ As the discussion below indicates, courts have frequently relied on the presence of one or more of these factors in concluding that a secured transaction was created.

2. Leases and Finance Leases.—Article 2A defines “lease” as “a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return,³⁰ or retention or creation of a security interest is not a lease.”³¹

The Article also creates a new definition, “finance lease.” For a transaction to be a “finance lease,” it must first be a lease rather than a sale or secured transaction.³² It must then meet the following three specific requirements: (1) “the lessor does not select, manufacture or supply the goods”; (2) the lessor acquires the goods in connection with the lease; and (3) any of the following: (a) the lessee receives a copy of the contract by which the lessor obtained the goods; (b) the lessee's approval of that contract is a condition to the lease; (c) before signing the lease, the lessee receives a complete statement of the promises, warranties, limitation of warranties, or damages, furnished to the lessor pursuant to the aforementioned supply contract; or (d) before the lessee signs the lease, if it is not a consumer lease, the lessor informs the lessee of the identity of the supplier (unless selected by the lessee), that

28. *Id.* § 1-201(37), second (a)-(e). For some reason, § 1-201(37) contains subsections (a)-(d) and a sentence fragment followed by (a)-(e), with no signal, letter, or number to distinguish between the first group of subsections and the second. Later in the section, there appear subsections (x)-(z), with nothing between (e) and (x).

29. *See* U.C.C. § 1-102(37) official cmt. (quoted in part in the text accompanying *supra* note 25).

30. *See id.* §§ 2-326, 2-327.

31. *Id.* § 2A-103(1)(j).

32. *Id.* § 2A-103(1)(g) & official cmt. (g).

the lessee is entitled to certain warranties, and that the lessee may communicate with the supplier and receive a statement of the supplier's promises and warranties.³³ The Official Comment describes a finance lease as

a three party transaction. The supplier manufactures or supplies the goods pursuant to the lessee's specification, perhaps even pursuant to a purchase order, sales agreement or lease agreement between the supplier and the lessee. After the prospective finance lease is negotiated, a purchase order, sales agreement, or lease agreement is entered into by the lessor (as buyer or prime lessee) or an existing order, agreement or lease is assigned by the lessee to the lessor, and the lessor and the lessee then enter into a lease or sublease of the goods. Due to the limited function usually performed by the lessor, the lessee looks almost entirely to the supplier for representations, covenants and warranties.³⁴

The Official Comment notes that many leases of goods back to their seller (sale-leasebacks) are in fact finance leases.³⁵

3. *The Cases.*—The author has found six cases which directly involved the determination whether, pursuant to then current Indiana law, a transaction couched in lease terms was really a secured transaction under old section 1-201(37).³⁶ To a large extent, the new legislation codifies the approach of one of these cases, *In re Marhoefer Packing Co.*,³⁷ which is a leading case in the field.

In *Marhoefer*, if the equipment lease at issue was a true lease, the lessor could reclaim the equipment from the estate of the bankrupt lessee. If it was a lease intended as security for the purchase price, the lessor's failure to file a financing statement to perfect its security interest under Article 9 rendered the lessor's position subordinate to that of the bankruptcy trustee.³⁸ The lease was for an initial term of four years,

33. *Id.* § 2A-103(1)(g).

34. *Id.* official cmt. (g).

35. *Id.* For a pre-Article 2A discussion and analysis of finance leasing, see Fairfax Leary, Jr., *The Procrustean Bed of Finance Leasing*, 56 N.Y.U. L. REV. 1061 (1981).

36. *TKO Equip. Co. v. C & G Coal Co.*, 863 F.2d 541 (7th Cir. 1988); *In re Marhoefer Packing Co.*, 674 F.2d 1139 (7th Cir. 1982); *Morris v. Lyons Capitol Resources, Inc.*, 510 N.E.2d 221 (Ind. Ct. App. 1987); *McEntire v. Indiana Nat'l Bank*, 471 N.E.2d 1216 (Ind. Ct. App. 1984); *United Leaseshares, Inc. v. Citizens Bank & Trust Co.*, 470 N.E.2d 1383 (Ind. Ct. App. 1984); *Bolen v. Mid-Continent Refrigerator Co.*, 411 N.E.2d 1255 (Ind. Ct. App. 1980).

37. 674 F.2d 1139 (7th Cir. 1982).

38. At the same time as the lease transaction, the lessee also purchased an identical piece of equipment pursuant to a conditional sale contract. The seller/lessor retained a security interest in this second machine and perfected that interest by an appropriate filing. Title to that equipment was not an issue in the case.

at the end of which the lessee could exercise one of two options: (1) purchase the equipment for \$9,968 or (2) renew the lease at \$2,990 per year for an additional four years, after which the lessee could purchase the equipment for one dollar. There was, however, no requirement that the lessee exercise either option, and the lessee could return the equipment to the lessor at the conclusion of the initial lease term with no further obligation. The bankruptcy occurred during the initial lease term.

The bankruptcy court found the transaction to be a true lease, but the district court reversed and based on the option to buy for one dollar at the end of the renewal term, concluded that as a matter of law pursuant to old section 1-201(37)(b),³⁹ the lease was intended as security. The court of appeals agreed with the district court's interpretation of the statute as a general matter, but declared that old section 1-201(37)(b) "does not apply where the lessee has the right to terminate the lease before that option [to purchase for nominal consideration] arises with no further obligation to continue paying rent."⁴⁰ Thus, because the lessee in *Marhoefer* had no obligation to pay rent beyond the first four years, the lease could be a true lease during its initial term.⁴¹ The court noted that had the lessee renewed for the second four year period, at the end of which it would have become the owner for only nominal consideration, the renewal lease would have been a security interest disguised as a lease pursuant to old section 1-201(37).⁴²

The court's approach is in close harmony with the intention of the drafters of new section 1-201(37). The elements that demonstrate that a lease *is* a security interest are the inability of the lessee to terminate and either the lessee's ultimate ownership of the goods for little or no consideration or the exhaustion of the economic life of the goods at the end of the lease term. "An essential characteristic of a true lease is that there be something of value to return to the lessor after the term."⁴³ It follows that if the lessee may terminate the lease before it becomes economically unrealistic for him not to become the owner or before the economic life of the goods is exhausted, there is something of value to be returned to the lessor, and a true lease is created.

One issue not directly addressed by new section 1-201(37), but dealt with by the court, is the "chameleon" lease. At its creation, a chameleon

39. See *supra* note 23.

40. *Marhoefer*, 674 F.2d at 1143-44.

41. There was also the question of whether the option price at the end of the initial term was nominal, thereby making it economically realistic for the lessee to buy the equipment, in which event the lease would be one intended for security.

42. *Marhoefer*, 674 F.2d at 1143.

43. *Id.* at 1145.

lease is a true lease with a substantial residual going back to the lessor at the end of the term but with an option to renew either to the end of the economic life of the goods or for a term ending with a purchase for nominal consideration.⁴⁴ The better view, and the one indicated by the court, is that each term should be treated independently and that the treatment of the new term should be based on the economic realities as of the inception of that new term.⁴⁵ Thus, the fact that the lessee might purchase for nominal consideration at the end of the second lease term did not change the nature of the initial transaction. Had there been a renewal, however, the lease would have become a secured transaction.

The court also considered the effect of the option to purchase for approximately \$9,600 at the end of the first term. If that purchase price was nominal, the transaction might still be a secured transaction under old section 1-201(37). This issue had not been addressed in the lower courts. The court of appeals observed, "In determining whether an option price is nominal, the proper figure to compare it with is not the actual fair market value of the leased goods at the time the option arises, but their fair market value at that time as anticipated by the parties when the lease is signed."⁴⁶ This, too, is in harmony with new section 1-201(37), which states that a lease does not create a security interest merely because the lessee has an option to buy "for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed" and that "[a]dditional consideration is not nominal if . . . when the option to become the owner of the goods is granted to the lessee [usually, as in *Marhoefer*, when the lease is created] the price is stated to be the fair market value of the goods determined at the time the option is to be performed."⁴⁷

In *Marhoefer*, the option purchase price was less than the fair market value at the time it was to be exercised. The Code drafters have observed that when a fixed price is less than fair market value but more than nominal, the determination of lease or security interest must be based on the facts of the transaction. The drafters also noted expressly that the rule of new section 1-201(37) did not deal with the specific facts of *Marhoefer* because "it would unnecessarily complicate the definition."⁴⁸

44. See Cooper, *supra* note 6, at 246-47.

45. See *Marhoefer*, 674 F.2d at 1143-44; Cooper, *supra* note 6, at 246-47.

46. *Marhoefer*, 674 F.2d at 1144-45.

47. U.C.C. § 1-201(37)(x). It would seem, however, that when the lease is for the economic life of the goods, the fair market value at the end would be nominal and there would be no residual interest in the lessor, thereby making the lease a secured transaction.

48. U.C.C. § 1-201(37) official cmt., para. 11.

The *Marhoefer* court declared, first, that a purchase price of almost \$10,000, which was fifty percent of the fair market value, is not nominal, and second, that the proper price for comparison to the stated option price is not the fair market value at the time the option is to be exercised, as the trustee contended, but the fair market value at the time of exercise as previously predicted when the option was granted. The fair market value at the time of exercise actually may be more or less than that estimate, but that fact alone does not change the transaction from a true lease to one given for security.⁴⁹ Indeed, making the actual comparison at the time the option is to be exercised could make the lease-secured transaction distinction turn on the rise or fall of the market, rather than on the nature of the transaction when entered into and could make the rights and duties of the parties turn on fortuitous circumstances rather than on planned consequences.

Finally, the court noted that old section 1-201(37) was silent as to what facts, other than the nominal renewal or purchase price, are to be considered in determining the lease or secured transaction issue.⁵⁰ It looked at a list of factors that included the total rent, the lessee's possible acquisition of equity in the goods, the useful life of the goods, the lessor's business, and the payment of taxes and insurance, which are usually the burden of the owner, and ruled that none of these factors changed its conclusion that the lease was a true lease.⁵¹ As observed earlier, in new section 1-201(37), the drafters intended to discourage the "laundry list" approach.⁵² The court and drafters agree that the payment of taxes, insurance, and other expenses, is neutral because the rental will be adjusted according to which party is obligated to cover these expenses. The lessee pays them pursuant to a "net" lease.⁵³

The remaining analysis of the court, particularly with reference to the total rental, the non-acquisition of equity by the lessee, and the useful life of the goods, was also in harmony with new section 1-201(37). The court stated that because the lessee's total rent payment under the first term was less than the purchase price of the goods with interest, the lessee acquired no equity whatever, and because the term of the lease was less than the useful life of the equipment, the transaction was not the conditional sale urged by the bankruptcy trustee.⁵⁴ New section 2-201(37) states, as noted earlier, that without the right of the lessee to

49. *Marhoefer*, 674 F.2d at 1144-45.

50. *Id.* at 1145.

51. *Id.*

52. *See supra* text accompanying note 25.

53. *See* U.C.C. § 1-201(37), second (b) & official cmt., para. 9; *Marhoefer*, 674 F.2d at 1146.

54. *Marhoefer*, 674 F.2d at 1145-46.

terminate, a lease for the full economic life of the goods is a secured transaction as a matter of law. The mere fact that the total payout may equal or exceed the fair market value of the goods, however, does not create a secured transaction as a matter of law.⁵⁵ It is conceivable that the lessor may be fully compensated for the purchase price of the goods plus interest, yet there may be a significant residual value or economic life at the conclusion of the lease.

Bolen v. Mid-Continent Refrigerator Co.,⁵⁶ involved a straightforward application of the old section 1-201(37)(b) rule that if the agreement permits the lessee to acquire the leased equipment at the end of the lease term for nominal consideration — in this case, one dollar plus sales tax — the lease was intended as security and the remedies for a lessee's default are governed by Article 9.⁵⁷ Because the lease did not grant the lessee a right to terminate before the conclusion of the lease term, the result would be the same under new section 1-201(37).⁵⁸

The following three state court cases relied on, at least partially, the laundry list approach that new section 1-201(37) seeks to eliminate. In *United Leaseshares, Inc. v. Citizens Bank & Trust Co.*,⁵⁹ the dispute was between a bank, which had initially financed a car dealer's acquisition of four automobiles and ultimately perfected its security interest, and the successor to a lessor under a sale-leaseback transaction in which the dealer sold the cars to the lessor and leased them back. The Indiana Court of Appeals affirmed the trial court's finding that the lease was a security lease, unperfected under Article 9, and that the bank's security interest was superior.⁶⁰ The court's ruling was based on the facts that

55. U.C.C. § 1-201(37).

56. 411 N.E.2d 1255 (Ind. Ct. App. 1980).

57. The lease agreement stated that it was for a term of four years at \$62 per month with an option for a maximum of five additional one year terms at \$62 per year. Exhibit A to Plaintiff's Amended Complaint, Brief for Appellant at 16-19, *Bolen v. Mid-Continental Refrigerator Co.*, 411 N.E.2d 1255 (Ind. Ct. App. 1980). The written shipping order, however, recited that the lessee had the option at the end of the lease term to purchase at one dollar plus sales tax. Exhibit B to Plaintiff's Amended Complaint, Brief for Appellant at 20, *Bolen v. Mid-Continental Refrigerator Co.*, 411 N.E.2d 1255 (Ind. Ct. App. 1980). The briefs of the parties are in the collection of the library at Indiana University School of Law—Indianapolis.

58. See *supra* text accompanying note 25.

59. 470 N.E.2d 1383 (Ind. Ct. App. 1984).

60. *Id.* at 1390. Unfortunately, there was a gap of several months in the perfection of the financing bank's security interest in the cars it financed for the dealer because its filed financing statement had expired, and the sale to the lessor took place during that period. See Appendix to Brief of Appellant, Findings of Facts, Conclusions of Law and Judgment of the Trial Court, Findings of Fact Nos. 42, 43, *United Leaseshares, Inc. v. Citizens Bank & Trust Co.*, 470 N.E.2d 1383 (Ind. Ct. App. 1984) [hereafter F.F.]. Otherwise, the matter might have been resolved simply on the basis of the bank's perfected

the lessee had assumed most of the obligations of ownership, including all operating expenses, insurance, title and other fees, taxes, and repairs, as listed in *Marhoefer*, and that the only economically feasible course for the lessee was to become the owner of the vehicles at the end of the lease term due to the low lease end value established by the lessor.⁶¹

The lease-secured transaction analysis was actually unnecessary to the result because the lessor, who did not buy in the ordinary course of business, knew that the sale was in violation of an existing security interest in the automobiles.⁶² Thus, the bank's position was superior to that of the lessee. However, because the court explored the lease-secured transaction issue so extensively, it is necessary to do so here. An analysis of the case using new section 1-201(37) does not lead to the same conclusion concerning the nature of the transaction.

Both the trial court and the court of appeals observed that the "low lease-end value" made purchase of the automobiles the only "economically feasible course" for the dealer to follow.⁶³ In the sale-leaseback transaction, however, the dealer received \$7,300 from the original lessor for each of the four automobiles⁶⁴ and, at the end of the two year lease term, had the option to buy each back at \$3,796, described by the lease as the wholesale fair market value and by the trial court as being "very conservative (low)."⁶⁵ The trial court specifically found that the value "was not nominal or free" and that as of the date of the trial, approximately six months after the inception of the two year lease, the fair market value of the cars was \$6,000 each.⁶⁶ Although it might make good economic sense for the lessee to take advantage of a good deal,

security interest continuing in the automobiles which were sold to the lessor out of the ordinary course of business. See U.C.C. §§ 9-306(2), 9-307(1).

61. *United Leaseshares*, 470 N.E.2d at 1387.

62. When the lessee received the proceeds of the sale-leaseback transaction, he should have paid off the purchase money creditor (the bank), but did not. Of great importance to the court were the facts that the cars never left the showroom of the dealer, the lessor never received the certificates of title for the cars on which the lessor's security interest should have been noted, see IND. CODE § 26-1-9-302(3) (1988), and the lessor never registered the cars in its own name as owner. The certificates of title were in the possession of the financing bank, not to be released until the debt for each car was paid. Furthermore, the trial court found that the lessor "was aware that [the dealer-lessee] had a floor plan financing arrangement with a bank, and that this bank would be holding a security interest in [the dealer]'s inventory." F.F. No. 37.

63. *United Leaseshares*, 470 N.E.2d at 1387.

64. This was \$80 per automobile less than the dealer received from the financing bank. F.F. Nos. 2, 5.

65. F.F. Nos. 26, 27.

66. F.F. Nos. 29, 23, 24. The court did not state whether the \$6,000 figure was wholesale value or retail value.

and the parties might have anticipated that he would do so, he was not obligated to do so. The price was far from nominal and was, based on any common understanding of automobile depreciation, probably fairly close to what would have been the wholesale value of the cars after two years. The residual value of the two-year-old cars to the lessor, based on remaining economic life, was considerable. Thus, under new section 1-201(37), the transaction appears to be a true lease.

One point not considered by the court was the fact that the lease provided that if the lessee did not purchase the vehicles, the lessor would sell them. If the sale price was less than the end price fixed in the lease, the lessee would make up the difference. If it was greater, the lessee would receive the excess.⁶⁷ This type of provision is referred to as a "terminal rental adjustment clause" (TRAC), about which section 1-201(37) is completely silent.⁶⁸ Whether or not a TRAC lease is a true lease has not been resolved in Indiana. Courts in other jurisdictions are divided on this issue.⁶⁹

Once it is established that the transaction qualifies as a lease, the fact that it is a sale-leaseback used by the seller-lessee as a financing tool does not disqualify it or make it subject to Article 9. Article 2A expressly recognizes sale-leaseback transactions as valid leases.⁷⁰ The drafters note that "[m]any leases that are leases back to the seller of goods (Section 2A-308(3)) will be finance leases."⁷¹

The court in *McEntire v. Indiana National Bank*⁷² stated that old section 1-201(37) established two ways for determining if a lease is really a conditional sale subject to Article 9: first, if the lessee has an option to purchase at the end of the lease for only nominal consideration, and second, if the transaction reflects certain court-established factors (the

67. F.F. Nos. 26.

68. See Huddleson, *supra* note 18, at 638-41.

69. Compare, e.g., *In re Tulsa Port Warehouse Co.*, 690 F.2d 809 (10th Cir. 1982) and *Bill Swad Leasing Co. v. Stikes*, 571 F.2d 1361 (5th Cir. 1978) (not a lease because lessee takes all risk of appreciation or depreciation) with *Budget Rent-A-Car v. Bergman*, 175 Cal. Rptr. 286 (Cal. Ct. App. 1981) (a lease because lessor has substantial residual interest). See Huddleson, *supra* note 18, at 638-41.

70. Section 2A-308(3) states in part: "[R]etention of possession of the goods pursuant to a lease contract entered into by the seller as lessee and the buyer as lessor in connection with the sale or identification of the goods is not fraudulent if the buyer bought for value and in good faith."

71. U.C.C. § 2A-103(1)(g) official cmt. (g). See the initial discussion of finance leases, *supra* notes 32-35 and accompanying text.

72. 471 N.E.2d 1216 (Ind. Ct. App. 1984). If the lease in this case was in fact a secured transaction, the guarantor was entitled to raise the defense that the sale of the collateral was commercially unreasonable, an issue of fact which precluded summary judgment for the lessor of telephone equipment.

laundry list).⁷³ The court could not, as a matter of law, declare that the option price of \$710 was nominal because there was no evidence of the fair market value of the leased telephone system at the time the option to purchase would have been exercised. The following factors, however, led the court to conclude that the lease was a secured transaction as a matter of law: the lessee had an option to purchase; the lessor purchased the system from a supplier; third parties were required to sign a guaranty; the lessee was responsible for insurance, taxes, other expenses, and risk of loss; the total rent equaled the purchase price plus interest; the defaulting lessee could be held responsible for the total unpaid rent or the balance less proceeds of resale; and the option price was less than twenty-five percent of the list price.⁷⁴ The court referred to the percentage of list price as an "economic realities" test.⁷⁵

Under new section 1-201(37), the only one of these factors which might justify finding a secured transaction rather than a lease is the option price, but not based upon that price being a particular percentage of the original list price, as the court's "economic realities" test mandated. The drafters rejected proposals that would rely on artificial formulae or specific percentages as determining factors. In particular, they rejected a proposal that an option price below a fixed percentage of original cost, such as ten percent, constituted nominal value and demonstrated conclusively that the lease was a secured transaction.⁷⁶ In a particular situation, nine percent of original cost could be fair market value at the time of the exercise of the option and, therefore, not nominal.

The problem created by the *McEntire* fact pattern, and perhaps in *Marhoefer* and *United Leaseshares* as well, is that the option price fixed in the lease ultimately may be more or less than the actual fair market value at the time the option is to be exercised. If less, the provision may give rise to a "bargain option," which, nevertheless, should be construed as consistent with a true lease unless the consideration is indeed nominal.⁷⁷ Only an extreme case should take a bargain option outside the range of the reasonably predictable fair market value. The test remains "whether, as a practical matter, at the outset of the transaction, the lessor had an economically meaningful interest in the residual."⁷⁸ In

73. *Id.* at 1221-22.

74. *Id.* at 1222.

75. *Id.*

76. See Huddleson, *supra* note 18, at 628-33. The drafters also rejected a proposal that an option price of 75% of the estimated fair market value demonstrated a true lease. *Id.*

77. *Id.* at 636-38.

78. *Id.*

McEntire, although "economic realities," to use the court's term, might make the purchase a good deal for the lessee, the lease should be considered a secured transaction only if the purchase was compelled by a price of nominal consideration or if the economic life of the leased goods was exhausted.

The other factors recited by the court to support its position would not, under new section 1-201(37), justify finding a secured transaction rather than a lease. That the lessee had an option to purchase and was required to pay insurance, taxes, and other expenses does not demonstrate that the lease was for security.⁷⁹ That the lessor purchased the equipment from a supplier and required guarantors of payment resembles the "finance lease" of Article 2A, which is a valid lease, not a secured transaction.⁸⁰

In *Morris v. Lyons Capitol Resources*,⁸¹ the lessees agreed to lease agricultural equipment for a total rent which exceeded the cost of the equipment plus interest, agreed to pay for insurance, taxes, license fees, and repairs, and had an option at the end of the lease term to renew for another year at the fair rental value or to purchase the equipment for its fair market value. Citing *United Leaseshares* and *McEntire*, and referring to the factors listed in both cases, the court concluded that a sufficient number of those factors were present to indicate that the lease was intended as security.⁸² As already noted, under new section 1-201(37), none of these factors support a finding of a secured transaction rather than a lease.

Also, because the option price was fair market value, the court said it could not conclude that the price was nominal.⁸³ Neither could the court conclude that the option price would have been less than twenty-five percent of the original cost, one of the factors in *McEntire*, although it noted that the challenged repossession and resale during the third year of the five year term yielded \$44,000 in a declining market for such equipment.⁸⁴ As with *McEntire*, the inquiry under the new provision should be whether there is any meaningful residual economic life at the end of the lease term, not the application of a particular formula based on a percentage of cost.

Finally, because the original party with whom the lessees agreed immediately assigned the agreement to a leasing company, the court

79. See U.C.C. § 1-201(37)(b), (c).

80. See the discussion of finance leases at *supra* notes 32-35.

81. 510 N.E.2d 221 (Ind. Ct. App. 1987). As in *McEntire*, the issue was the commercial reasonableness of the repossession and sale of the "leased" equipment and the appropriateness of summary deficiency judgment for the lessor.

82. *Id.* at 223.

83. *Id.*

84. *Id.* at 223 n.3.

concluded that the leasing company purchased the equipment from that original party "in order to provide financing while retaining a security interest."⁸⁵ As with *McEntire*, this more closely resembles the "finance lease" of Article 2A than a secured transaction under Article 9.

TKO Equipment Co. v. C & G Coal Co.,⁸⁶ adds an interesting twist because the lessor argued that the transaction created a security interest, not a lease, which is the reverse of the usual argument. The printed lease for two earthmovers provided for a monthly rent of \$15,000, a minimum term of one month, and an option to purchase the equipment for \$90,000 at any time during the term of the lease with full credit for rental payments previously made. The lease also expressly declared that because the lessee was under no obligation to purchase the equipment, the lease was not to be construed as creating a security interest. Despite this disclaimer, the lessor immediately filed a financing statement asserting that it had a security interest in the equipment.

It was necessary for the lessee to have substantial repairs performed on the earthmovers, but the lessee was unable to pay the repair company. After the lessee had made its sixth monthly payment, thereby becoming entitled to ownership of the earthmovers, the repair company filed its own financing statement. However, because the lessee was behind on other payments to the lessor and (the parties assumed) the lessee had previously signed a future advances clause, the right of the repair company turned on whether the agreement was a lease or a secured transaction.

The district court characterized the transaction as a disguised sale-secured transaction and held in favor of the lessor who had a prior perfected security interest. The court of appeals concluded otherwise, ruled that the transaction was a lease, and held in favor of the repair company.⁸⁷ The latter court observed that this case was the reverse of the usual situation in which the "lessor" claims the transaction is a lease in order to recover the goods from a trustee in bankruptcy.⁸⁸ In *TKO*, the "lessor" wanted the transaction to be secured, so that its alleged prior perfected security interest would be superior to the security interest of the repairer. If it was a lease, at the end of which the lessee virtually automatically became the owner of the goods, the lessor's attempt to perfect a prior security interest by filing would be ineffective and irrelevant, and the repairer would prevail as having a prior perfected interest in the equipment.

Of major importance to the court of appeals was the fact that the language of the lease agreement emphatically denied that the transaction

85. *Id.* at 223 n.2.

86. 863 F.2d 541 (7th Cir. 1988).

87. *Id.* at 546.

88. *Id.* at 544.

created a security interest, but the lessor, nevertheless, filed a financing statement. The court refused to allow the lessor to have it both ways and ruled, in effect, that the language used by the lessor estopped it from claiming that a secured transaction was created.⁸⁹

Applying new section 1-201(37) and Article 2A to the transaction, the agreement takes on the characteristics of a chameleon lease, discussed earlier in connection with *Marhoefer*. At its inception, the transaction fulfilled the definitional requirements of new section 1-201(37) that it be terminable by the lessee with no further obligation and have a substantial residual value to the lessor. By the time the sixth payment of \$15,000 was made, however, the lessee had the right to ownership, and there was no residual value for the lessor. At some time during the six month lease term, the lease changed into a secured transaction. The questions a court should explore under the new statutory provisions are whether the financing statement filed at the inception of the lease term protected the lessor at the time of the change, whether the previously perfected security interests of the lessor included this after acquired equipment, or whether the lessor had an unperfected security interest, subordinate to the security interest of the repairer who had filed. The estoppel question might still be pertinent to whether the repairer was induced by the security disclaiming language of the lease agreement (a) to release its repairer's possessory lien, which would have been superior to any other security interest, perfected or not, by returning the repaired equipment to the lessee and (b) to gamble on the ability to perfect by filing once the lessee acquired ownership rights in the equipment at the end of the lease term.

C. *The Substantive Provisions*

In the view of the drafters of Article 2A, "[t]he lease is closer in spirit and form to the sale of goods than to the creation of a security interest."⁹⁰ Consequently, the drafters relied heavily on Article 2—Sales for both format, including some numbering, and substantive provisions,

89. *Id.* at 544-46. Pursuant to U.C.C. § 9-408, a true lessor may file a financing statement, "but its filing shall not of itself be a factor in determining whether or not the . . . lease is intended as security (Section 1-201(37)). However, if it is determined for other reasons that the . . . lease is so intended, a security interest of the . . . lessor which attaches to the . . . leased goods is perfected by such filing." *Id.* The Official Comment notes that a true lessor may "file for safety even while contending that the lease is a true lease for which no filing is required." *Id.* § 9-408 official cmt. 2. Thus, the filing is neutral, and other factors will determine the ultimate classification.

90. *Id.* § 2A-101 official cmt. statutory analogue.

many of which were incorporated into Article 2A bodily, with only some language changes to reflect the nature of the transaction as a lease rather than a sale.⁹¹ As with the Sales Article, the first digit of the three number section designation following the article (or Indiana chapter) number is an indicator of the general subject matter of that group of sections. Thus, section 2.1-102 "Applicability" is in a group of general provisions, and section 2.1-201 "Statute of Frauds" is in a group of sections dealing with contract formation.⁹²

1. *Part 1 — The General Provisions.*—Of particular note in the general provisions of Article 2A, in addition to the definition of "finance lease" discussed earlier,⁹³ is the definition of "consumer lease," a lease between a merchant lessor and an individual "who takes under the lease primarily for a personal, family or household purpose, if the total payments" excluding options do not exceed \$25,000.⁹⁴ Unlike Article 2, which does not contain any provisions directed specifically to consumer issues, Article 2A contains a number of provisions directed only to consumer leases.⁹⁵ One of these provisions makes unenforceable a choice of law other than that of the residence of the consumer lessee.⁹⁶

Also of note is the inclusion of a provision expressly authorizing a court to take appropriate action in the event the lease contract or any clause in it was unconscionable when the contract was made. More specifically, if the court finds that a consumer lease was induced by unconscionable conduct or that unconscionable conduct occurred during collection under a consumer lease, "the court may grant appropriate relief."⁹⁷

91. See *supra* note 10 and accompanying text. With respect to the similarity in numbering, for example, the Statutes of Frauds in the Sales and Leases articles are found in §§ 2-201 and 2A-201, respectively, and the Parol Evidence Rules are found in §§ 2-202 and 2A-202, respectively.

92. See 1B U.L.A. 44 (Supp. 1991), which contains the heading, "Part 1 General Provisions," preceding the § 2A-1 series of sections. The other headings are: "Part 2 Formation and Construction of Lease Contract," *id.* at 57; "Part 3 Effect of Lease Contract," *id.* at 64; "Part 4 Performance of Lease Contract: Repudiated, Substituted and Excused," *id.* at 84; and "Part 5 Default," *id.* at 87. Although the Indiana Code utilizes individual section headings similar to those of the 1990 Official Draft, it does not utilize the Part headings. Neither does the West annotation, although West is the publisher of U.L.A. For an example of the difference in sections headings, compare § 2A-102 (Scope) with § 26-1-2.1-102 (Applicability).

93. See the discussion *supra* notes 32-35 and accompanying text.

94. See U.C.C. § 26-1-2.1-103(e). The 1987 Official Draft set the figure at \$25,000; the 1990 Official Draft leaves the amount blank for a determination by the enacting state's legislature.

95. See *id.* § 2A-103 official cmt. (e) (citing a number of such sections).

96. *Id.* § 2A-106.

97. *Id.* § 2A-108(2).

2. *Part 2 — Formation and Construction.*—The statute of frauds, parol evidence rule, general formation, firm offer, manner of acceptance, course of performance, and modification provisions of Article 2A are similar to those in Article 2.⁹⁸ The monetary floor above which a lease must be evidenced by some writing, with enumerated exceptions, is \$1,000.⁹⁹

The drafters deemed it unnecessary to include a section similar to section 2-207 on the "battle of the forms," apparently because they thought that such battles are unusual in leasing transactions.¹⁰⁰ In *Rockwood Manufacturing Corp. v. AMP, Inc.*,¹⁰¹ however, the court was confronted with precisely such a battle. Following discussions about the leasing of a machine, the lessor sent a quotation to the lessee which stated that it was not an offer and that all orders were subject to acceptance by the lessor in accordance with its standard acknowledgement form. The lessee sent a purchase order which incorporated the quotation by reference and included a \$14,000 check as requested therein. The lessor returned its standard acknowledgement form which disclaimed warranties and limited remedies. It also cashed the check.

The court of appeals affirmed the trial court's conclusion that the U.C.C. did not apply, that the cashing of the \$14,000 check did not constitute an acceptance, and that because the acknowledgement form contained terms additional to those in the purchase order, it constituted a counter-offer which was accepted by the lessee when it took delivery of the machine and did not object to the terms in the acknowledgement.¹⁰² The court specifically declared that the "mirror image" rule applies in Indiana and controlled the case.¹⁰³

Section 2-207 was specifically designed to do away with the mirror image rule and the "last shot doctrine" which it perpetuates.¹⁰⁴ Unfortunately, without a parallel provision in Article 2A, both will continue to apply unless the courts, as a matter of common-law development, are willing to deal with a battle of the forms in the manner suggested by section 2-207 and the Restatement (Second) of Contracts.¹⁰⁵

98. Compare *id.* §§ 2A-201 to -208 with *id.* §§ 2-201 to -209.

99. *Id.* § 2A-201.

100. See Huddleson, *supra* note 18, at 620.

101. 806 F.2d 142 (7th Cir. 1986).

102. *Id.* at 144.

103. *Id.*

104. See, e.g., *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 380 N.E.2d 571 (Ind. Ct. App. 1978); HAROLD GREENBERG, RIGHTS AND REMEDIES UNDER U.C.C. ARTICLE 2 § 7.1 (1987); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1-3 (3d ed. 1988).

105. Restatement (Second) Contracts § 59 (1981), states "A reply to an offer which

Article 2A includes all of the warranties created in Article 2, whether express or implied.¹⁰⁶ However, if the lease is a finance lease, in which the lessor is actually only a financing party and the lessee looks to the supplier of the goods for performance of warranties, the finance lessor does not make a warranty against infringement,¹⁰⁷ nor does the lessor make either an implied warranty of merchantability or of fitness for particular purpose.¹⁰⁸ Instead, the lessee under a finance lease is expressly made the beneficiary of all promises and warranties by the supplier of the goods to the finance lessor under the supply contract by which the finance lessor obtains the goods in the first place.¹⁰⁹

Disclaimer or modification of warranties is the same as in Article 2, except that, unlike Article 2, Article 2A requires the disclaimer of the implied warranty of merchantability to be conspicuous and in writing.¹¹⁰ The strict horizontal privity requirements of Indiana's Article 2 have been continued by the adoption of Alternative A to section 2A-216.¹¹¹

The Article 2A provisions concerning risk of loss, that is, which party bears the loss in the event of damage or destruction of the goods through no fault of either of them, have made little change in the prevailing common law. The statute states that except in the case of a finance lease, or unless the parties agree otherwise, risk of loss does not pass to the lessee, but remains on the lessor. However, if the lease is a finance lease, risk of loss passes to the lessee.¹¹²

Prior to the enactment of Article 2A, leases of goods were governed by the common law of bailment. If the goods were in good condition when received by the bailee and in damaged condition when returned or not returned at all, there was an inference that the loss was caused by the negligence of the bailee.¹¹³ The bailee had the burden of producing

purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer." The *comment* adds, "[b]ut a definite and seasonable expression of acceptance is operative despite the statement of additional or different terms if the acceptance is not made to depend on assent to the additional or different terms," followed by a citation to § 2-207(1).

106. See U.C.C. § 2A-210 (express warranties); *id.* § 2A-211 (warranties against interference and infringement); *id.* § 2A-212 (implied warranty of merchantability); *id.* § 2A-213 (implied warranty of fitness for particular purpose); *id.* § 2A-210, official cmt. (purposes).

107. See *id.* § 2A-211(2).

108. See *id.* §§ 2A-212, -213.

109. See *id.* § 2A-209.

110. Compare *id.* § 2-316(2) with *id.* § 2A-214(2).

111. See U.C.C. § 2A-216, Alternatives A, B, and C, 1B U.L.A. 689 (1989). Compare *id.* § 26-1-2-318 with *id.* § 26-1-2.1-216.

112. *Id.* § 2A-219(1).

113. See *Carl Subler Trucking, Inc. v. Splittorff*, 482 N.E.2d 295, 297 (Ind. Ct. App. 1985) (lease of tractor trailer).

evidence, but not the burden of proof, that he was without fault. Once the bailee produced evidence of lack of fault, the burden of proof was on the bailor. If, indeed, the bailee was without fault, he was not liable for the loss.¹¹⁴ The obligations of the bailee, however, could be expanded by agreement to impose liability for loss regardless of fault, as where the lease agreement requires the bailee to return the goods in as good condition as received, reasonable wear and tear excepted.¹¹⁵ It is highly likely that most leases under Article 2A will contain a similar provision and that courts will continue to interpret such provisions as a contractual modification of the statutory allocation of risk of loss. Automobile lessors, for example, typically inform lessees that the lessees will be responsible for any damage and try to persuade the lessees to purchase additional insurance. Once it is determined that risk of loss will pass from the lessor to the lessee, the provisions on when risk passes are similar to those in Article 2.¹¹⁶

3. *Part 3 — Effect of the Lease Contract.*—The 300 series in Article 2A deals primarily with the relationship between the lessor, lessee, and third parties, and is derived from both Article 2 and Article 9.¹¹⁷ Both voluntary and involuntary transfers of either party's interest will be effective, regardless of a lease term prohibiting any transfer. However, a prohibited transfer may be a default under the lease, thereby entitling the nontransferring party to various remedies. Even if not prohibited, the transfer may adversely affect the rights or duties of the nontransferring party, thus entitling her to damages and/or cancellation of the lease.¹¹⁸

In a fashion similar to the ability of a holder of voidable title to transfer good title under section 2-403, a subsequent lessee from a lessor who had already leased the goods can obtain a good leasehold, subject to the existing lease.¹¹⁹ Similarly, a buyer or sublessee from a lessee takes what the lessee had the power to transfer, subject to the lease agreement.¹²⁰

In *McDonald's Chevrolet, Inc. v. Johnson*,¹²¹ the lessee of a motor home for a thirteen day term traded the home to a dealer as partial

114. *See id.*

115. *See, e.g.,* Light v. Lend Lease Transp. Co., 156 N.E.2d 94, 99-100 (Ind. Ct. App. 1959) (theft of leased automobile); Morrow, Inc. v. Paugh, 91 N.E.2d 858, 859-60 (Ind. Ct. App. 1950) (destruction of leased truck).

116. *Compare* U.C.C. §§ 2-509 to -510 *with id.* §§ 2A-219 to -220.

117. *See id.* §§ 2A-301 to -311 official cmts. uniform statutory source.

118. *See id.* § 2A-303 & official cmts.

119. *See id.* § 2A-304 & official cmts.

120. *See id.* § 2A-305(1) & official cmts.

121. 376 N.E.2d 106 (Ind. Ct. App. 1978).

payment for a truck. That dealer sold it to a second dealer who intended to resell it. After the police seized the motor home from dealer two, dealer two sued his seller (dealer one) for breach of the warranty of title.¹²² In applying section 2-403, the court determined that the trade-in was a sale and that the sale by dealer one to dealer two could stand only if dealer one had voidable title.¹²³ The court stated that the lessee had only a possessory interest limited to the lease term of thirteen days and that this possessory interest was all that he could transfer.¹²⁴ Accordingly, dealer one had void title and had breached the warranty.¹²⁵ The result would be the same under section 2A-305 because any subsequent buyer from a lessee takes subject to the lease. Upon the expiration of the lease term, the lessee has no title whatever.

Article 2A is consistent with Article 9 in that a statutory possessory lienholder (such as a repairman) has priority over the rights of the lessor or lessee,¹²⁶ but other creditors of the lessee take subject to the lease contract, as do creditors of the lessor under ordinary circumstances.¹²⁷ The remaining sections of Article 2A's 300 series contain detailed rules regarding leased goods which become fixtures or accessions¹²⁸ and permit the parties to agree to subordinate a priority.¹²⁹ Of special importance with respect to goods which become fixtures is the provision permitting the lessor to perfect his interest in the goods and obtain priority over creditors of the lessee by filing a financing statement as a fixture filing pursuant to the rules of Article 9 even though the lease agreement is a true lease and not a security agreement.¹³⁰

4. *Part 4 — Performance: Repudiated, Substituted, or Excused.*— The provisions on insecurity and adequate assurances of performance, anticipatory repudiation and retraction thereof, substituted performance, and excused performance (impracticability) are essentially the same under Article 2A as under Article 2.¹³¹

The promises of the lessee under a finance lease that is not a consumer lease become irrevocable and independent of the lessee's acceptance of the goods.¹³² This provision is a codification of the "classic 'hell or

122. U.C.C. § 2-312(1).

123. *McDonald's Chevrolet*, 376 N.E.2d at 109.

124. *Id.*

125. *Id.*

126. See U.C.C. §§ 2A-306, 9-310.

127. See *id.* § 2A-307.

128. See *id.* §§ 2A-309, -310.

129. *Id.* § 2A-311.

130. See *id.* § 2A-309(9).

131. Compare *id.* §§ 2A-401 to -406 with *id.* §§ 2-609, -610, -611, -614, -615, -616.

132. *Id.* § 2A-407(1).

high water' clause'' by which the lessee must continue to pay the rent regardless of any defect in the goods, failure of the goods, or failure in the lessor's performance.¹³³ As noted earlier, the finance lessee has the benefit of all promises made to the lessor by the supplier of the goods, including any warranties of quality.¹³⁴

5. *Part 5 — Default.*—In its provisions on default and remedies, Article 2A resembles both Articles 2 and 9. As provided in Article 2, there may be a breach of the lease agreement by either party, thereby entitling the nonbreaching party to a variety of remedies, including damages.¹³⁵ As in Article 9, the lessor may be entitled to repossess the goods in the event of a breach or default in the same manner as a secured party.¹³⁶ Whether the lessee is in default and what remedies will be available to the other party will be determined by provisions of both Article 2A and the lease agreement itself.¹³⁷ These provisions are quite detailed and will be discussed here only in summary fashion.

As in Article 2, a remedy may be limited or made exclusive by agreement, but if any limitation of remedy fails of its essential purpose or is unconscionable, the lessee may resort to all available remedies.¹³⁸ The parties may also liquidate damages either by a set amount or by a formula based on anticipated harm.¹³⁹ Subject to any offset for actual damages, a breaching nonconsumer lessee who has made some payments but has not yet received the goods may recover, by way of restitution, twenty percent of the present value of the total rent due under the lease; a consumer lessee may recover the lesser of that figure or \$500.¹⁴⁰

The statute of limitations in Article 2A, like that in Article 2, is four years from the accrual of the cause of action.¹⁴¹ However, unlike Article 2, the cause of action under Article 2A accrues when the default or breach of warranty is or should have been discovered by the nonbreaching party.¹⁴² Under Article 2, the cause of action accrues at the time of delivery in the case of a breach of implied warranty or an express warranty that does not extend to future performance.¹⁴³

133. See *id.* official cmts.

134. See *id.* § 2A-407 official cmt. 2. See also *supra* notes 106-09 and accompanying text.

135. U.C.C. § 2A-501.

136. *Id.*

137. *Id.*

138. Compare *id.* § 2A-503 with *id.* § 2-719.

139. *Id.* § 2A-504(1).

140. See *id.* § 2A-501(3), (4).

141. Compare *id.* § 2A-506 with *id.* § 2-725.

142. *Id.* § 2A-506.

143. *Id.* § 2-725.

The rules concerning the lessee's right to reject the goods, duties with respect to rejected goods, cure by the lessor, acceptance of the goods and the effect thereof, and rejection of the goods are substantially similar to those set forth in Article 2, but have been rewritten to reflect the fact that a lease is involved.¹⁴⁴ There are also some important changes. For example, if the lessor fails to give instructions following rejection, a merchant lessee must arrange to dispose of goods which threaten to decline in value speedily,¹⁴⁵ whereas a buyer is expressly required to do so only if the goods are perishable.¹⁴⁶

In the case of a finance lease, if the lessee has accepted the goods with knowledge of a nonconformity, the lessee may not thereafter revoke acceptance because of that nonconformity,¹⁴⁷ but the lessee will still have his warranty claim against the supplier.¹⁴⁸ In any other case, or if a finance lessee accepts the leased goods without knowledge of the nonconformity, revocation is the same as under Article 2.¹⁴⁹ A lessee must give notice of breach and, except for a consumer lessee, of possible third party liability to the lessor. In the case of a finance lease, notice must also be given to the supplier. Any remedy against the party not notified will be barred.¹⁵⁰ Because, unlike a seller, a lessor may have continuing duties under the lease, the lessee may be able to revoke acceptance for breach of those duties.¹⁵¹

Section 2A-508, in a manner similar to section 2-711, is an index of the lessee's remedies in the event of rejection, revocation, lessor's repudiation, or nondelivery. The remedies include cancellation of the contract, recovery of any rent already paid, cover, damages for non-delivery, recovery of identified goods, or specific performance. Each of these is dealt with in more detail in a specific section.¹⁵² The section also lists a right to recover damages for breach of warranty, gives the lessee a security interest in the goods for any rent, security, or expenses incurred, and allows the lessee to deduct her damages from any rent still owing.¹⁵³ Although based on the similar Article 2 remedies, each

144. Compare *id.* §§ 2A-509 to -517 & official cmts. with *id.* §§ 2-508, -601 to -608, & 2-612.

145. *Id.* § 2A-511(1).

146. *Id.* § 2-603.

147. *Id.* § 2A-516(2).

148. *Id.* official cmt. 1. See *supra* note 133 and accompanying text (discussion of "hell or high water clause").

149. Compare *id.* § 2A-516(2), -517 with *id.* § 2-607, -608.

150. See *id.* § 2A-516(4), (5) & official cmt. This is similar to § 2-607(3) and to § 2-607(5) on vouching in.

151. *Id.* § 2A-517.

152. See *id.* §§ 2A-509 to -522.

153. *Id.* § 2A-508(4)-(6).

of these remedies is revised to reflect the terminology and circumstances of leases rather than sales as in the use of the term "market rent" rather than "market price."¹⁵⁴

The remedies of a lessor who still has control of the goods, i.e., when the lessee wrongfully rejects or revokes acceptance, fails to make a payment when due, or repudiates, are similarly indexed in section 2A-523.¹⁵⁵ Included in the lessor's remedies are the rights to cancel the lease, to withhold delivery, to stop delivery, to dispose of the goods and recover damages, to retain the goods and recover damages, or to resort to any other remedies provided in the lease.¹⁵⁶ If the lessee's default substantially impairs the value of the lease contract, the lessor may resort to any of the remedies listed; otherwise, he may recover only the loss resulting in the ordinary course of events.¹⁵⁷ Each of the specific remedies is similar to those set forth in Article 2 but is redrafted to reflect the fact that a lease, rather than a sale, is involved.

In a sale transaction, once the buyer has accepted conforming goods, the seller has no interest in those goods and is entitled to recover their price.¹⁵⁸ Only if the sale is part of a secured transaction does the seller (or other financing party) have any interest in the goods. In the true lease situation, however, the lessor has a residual interest in the goods which, in the event of a default by the lessee, the lessor will seek to protect. It is at this point that the drafters of Article 2A turned from Article 2 to Article 9 as a model.

The lessor's remedies, upon a default by the lessee which substantially impairs the value of the lease to the lessor are quite detailed. In summary, the lessor may retake possession of the goods or, without removal, "render unusable any goods employed in trade or business."¹⁵⁹ The lessor need not resort to the courts if either of these courses may be achieved without a breach of the peace.¹⁶⁰ The subsequent remedies available to the lessor are similar to those in Article 2, pursuant to which the aggrieved seller may either resell and recover the difference between the resale and the contract prices¹⁶¹ or retain the goods and recover the difference between the market and contract prices.¹⁶²

The aggrieved lessor who has control of the goods may dispose of the goods either by lease or sale and recover accrued and unpaid rent,

154. Compare *id.* § 2A-519 with *id.* §§ 2-513, 2-514.

155. Compare *id.* § 2A-523 with *id.* § 2-703.

156. *Id.* § 2A-523(1).

157. *Id.* § 2A-523(2), (3).

158. *Id.* §§ 2-607(1), 2-709(1).

159. See *id.* § 2A-525(2) & official cmt. Cf. *id.* § 9-503.

160. *Id.* § 2A-525(3).

161. *Id.* § 2-706.

162. *Id.* § 2-708.

the present value of the rent for the remaining lease term less the present value of the new lease, and incidental damages.¹⁶³ Alternatively, he may keep the goods and recover any accrued and unpaid rent, the present value of the rent for the remaining lease term less the present value of the market rent for the same lease term, and incidental damages.¹⁶⁴ This latter measure of damages is also appropriate if the lessor's disposition of the goods does not qualify for the release or resale measure of damages.¹⁶⁵

Finally, just as the Article 2 seller may recover the price of the goods under limited circumstances,¹⁶⁶ the aggrieved lessor may recover accrued and unpaid rent, the present value of the rent remaining under the lease, and incidental damages for goods accepted by the lessee and not repossessed by the lessor or for goods identified to the contract if, after reasonable efforts to dispose of them, the lessor is unable to or highly unlikely to dispose of them at a reasonable price.¹⁶⁷ The lessor must hold the goods for the lessee for the remaining term of the lease, although the lessor may dispose of the goods before the end of the term, in which event damages will be measured by the provisions discussed in the preceding paragraph.¹⁶⁸

II. ARTICLE 4A—FUNDS TRANSFERS

The primary focus of Article 4A is on wholesale electronic transfers of funds which typically involve large sums of money and are principally between sophisticated business or financial institutions.¹⁶⁹ It is new law based on technology which did not exist when the U.C.C. was drafted and for which there had previously been no single body of law to define the rights and obligations of the parties to these transfers.¹⁷⁰

A typical funds transfer is described by the drafters as follows:

X, a debtor, wants to pay an obligation owed to Y. Instead of delivering to Y a negotiable instrument such as a check or some other writing such as a credit card slip that enables Y to obtain

163. *Id.* § 2A-527.

164. *Id.* § 2A-528.

165. *Id.*

166. *Id.* § 2-709(1).

167. *Id.* § 2A-529(1).

168. *Id.* § 2A-529(3).

169. See U.C.C. Art. 4A prefatory note, 2B U.L.A. 457-59 (1991). More than one trillion dollars per day is transferred over the wire payment systems of the Federal Reserve wire transfer network and the New York Clearing House Interbank Payments Systems. *Id.*

170. *Id.* at 458.

payment from a bank, X transmits an instruction to X's bank to credit a sum of money to the bank account of Y. In most cases X's bank and Y's bank are different banks. X's bank may carry out X's instruction by instructing Y's bank to credit Y's account in the amount that X requested. . . . The instruction that X issues to its bank is a "payment order." X is the "sender" of the payment order and X's bank is the "receiving bank" with respect to X's order. Y is the "beneficiary" of X's order. When X's bank issues an instruction to Y's bank to carry out X's payment order, X's bank "executes" X's order. . . . The entire series of transactions by which X pays Y is known as the "funds transfer. . . ." With respect to the funds transfer, X is the "originator," X's bank is the "originator's bank," Y is the "beneficiary" and Y's bank is the "beneficiary's bank."¹⁷¹

Although this transaction may, in some ways, resemble payments made by check, covered by Articles 3 and 4, or by consumer electronic transfers (bank-by-phone or automated teller machines), covered by the Federal Electronic Fund Transfer Act,¹⁷² which are excluded from Article 4A,¹⁷³ Article 4A treats the funds transfer "as a unique method of payment that is governed by unique principles of law that address the operational and policy issues presented by this kind of payment."¹⁷⁴

Among the problems facing the drafters of Article 4A were the liability of the receiving bank (X's bank) for consequential damages in the event of failure properly to transmit the payment order, allocation of risk of loss in the event of unauthorized or fraudulent payment orders, misdescription of the beneficiary, errors made in the course of the wire transfer (such as duplicate transmissions), payment to an unintended beneficiary, and transfer of an incorrect amount.¹⁷⁵ Each of these problems is dealt with by a set of "precise and detailed rules" rather than broad, general principles and were drafted to enable the parties to a

171. *Id.* at 457. For these and additional definitions, see U.C.C. §§ 4A-104, -105.

172. 15 U.S.C. § 1693 (1988).

173. U.C.C. § 4A-108.

174. U.C.C. Art. 4A prefatory note, 2B U.L.A. 457 (1991).

175. See Tina E. McKelvy, Note, *Article 4A of the Uniform Commercial Code: Finally, Banks and Their Customers Know Where They Stand and Who Pays When a Wire Transfer Goes Awry*, 21 MEM. ST. U. L. REV. 351 (1991). See also Robert G. Ballen & Natalie H. Diana, *Duties of the Beneficiary's Bank*, 45 BUS. LAW. 1467 (1990); Thomas C. Baxter, Jr. & Raj Bhala, *Proper and Improper Execution of a Payment Order*, 45 BUS. LAW. 1447 (1990); J. Kevin French, *Unauthorized and Erroneous Payment Orders*, 45 BUS. LAW. 1425 (1990); Norman R. Nelson, *Settlement Obligations and Bank Insolvency*, 45 BUS. LAW. 1473 (1990).

funds transfer "to predict risk with certainty, to insure against risk, to adjust operational and security procedures, and to price funds transfer services appropriately."¹⁷⁶

Of prime importance is the establishment by the parties of a "security procedure" of some kind, whether by way of codes, callbacks, or other devices, to assure that the payment order or other communication is that of the customer and is correct.¹⁷⁷ The remaining rights and obligations of the various parties, particularly with reference to allocation of their respective risks, are quite detailed. To attempt to summarize would require essentially a repetition of the language of both the statutory sections and the Official Comments, many of which contain comprehensive examples and descriptions of the type of transaction or problem involved. The reader is urged to consult both in dealing with funds transfers problems.

III. CONCLUSION

As we move toward the twenty-first century, the sponsors of the U.C.C. have continued their review and updating to keep the law of commercial transactions as modern, effective, and efficient as possible. By enacting Articles 2A and 4A in 1991, the Indiana Legislature has followed the sponsors' lead. It is hoped that the legislature will continue to do so as new or revised Articles of the U.C.C. are promulgated. Next will likely come the adoption of newly revised Articles 3 and 4, and ultimately, a revised Article 2.¹⁷⁸ And in another forty or fifty years, the process will begin again.

176. U.C.C. § 4A-102 official cmt.

177. *See id.* § 4A-201 & official cmt.

178. Gerald R. Bepko, Chancellor of Indiana University's Indianapolis campus and former Dean of I.U. School of Law—Indianapolis, is a member of the N.C.C.U.S.L. Article 2 Drafting Committee, whose work is well under way. He predicts that the new versions of Articles 3 and 4 will be introduced in the Indiana Legislature during the 1993 session. The introduction of a new Article 2 will take a bit longer.

Developments in Indiana Banking Law

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BACKGROUND

Indiana laws regulating the powers and structure of state-chartered financial institutions¹ have undergone profound changes over the past several years. Recent legislative reforms in Indiana are part of an ongoing effort which began in 1985 with the passage of Senate Enrolled Act No. 1 (Senate Bill 1)² to revise and improve Title 28 of the Indiana Code. Senate Enrolled Act No. 152 (SEA 152),³ signed into law by Governor Evan Bayh on May 12, 1991, represents the most recent of these reform efforts.⁴ SEA 152, which was in most respects the product of the Interim Study Committee on Financial Institutions and Consumer Credit (Committee) authorized by the 1990 General Assembly,⁵ represents the first installment of a systematic effort to completely revise and improve Title 28 of the Indiana Code.⁶

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1. The powers and structure of banks and other financial institutions created pursuant to the laws of the state of Indiana are governed generally by the provisions of Title 28 of the Indiana Code.

2. Pub. L. No. 265-1985. For published summaries of the changes to Title 28 resulting from the 1985 Act, see Susan Barnhizer Rivas & David P. Lewis, *Senate Enrolled Act No. 1: A New Era of Banking Expansion in Indiana*, 19 IND. L. REV. 115 (1986); Jonathan L. Birge, *Senate Bill 1: Impact on Indiana Banking*, 29 RES GESTAE 75 (1985).

3. Pub. L. No. 33-1991. For a brief summary of some of the key changes to Title 28 that resulted from the 1991 Act, see Thomas H. Ristine, *The Title 28 Project: Year One*, HOOSIER BANKER, Aug. 1991, at 24, 24.

4. At the time this Article goes to press, House Enrolled Act No. 1138 was passed by the 1992 Indiana General Assembly and signed into law by the Governor. Bill 1138, *inter alia*, conforms relevant corporate governance provisions of Title 28 to provisions of the Indiana Business Corporations Law, IND. CODE §§ 23-1-17-1 to -54-3 (1988 & Supp. 1991), consolidates and streamlines the law governing the formation of banks and savings associations, eliminates the state lending limits statute and adopts in its place federal law lending limits, eliminates the state law definition of "affiliate" and adopts the federal law definition found in Section 23A of the Federal Reserve Act, and extends the time a bank may hold real estate from five to ten years.

5. S. Con. Res. 19, 106th Gen. Assembly, 2d Sess. 1 (1990).

6. See Ristine, *supra* note 3, at 24.

The Committee's objective, as defined by its mission statement, was to consider

a substantive revision of appropriate portions of Title 28 . . . of the Indiana Code, to include such matters as: repealing state laws in conflict with Federal law, repealing obsolete statutes, meshing state law with Federal law to simplify regulation of state-chartered financial institutions, and, examining statutory functional and geographic restrictions on state-chartered financial institutions which have negative economic consequences, and which can invite Federal pre-emption.⁷

Recognizing that these objectives could not be fully accomplished in the limited period preceding the 1991 legislative session, the Committee directed its Drafting Group (consisting of representatives of the state's Department of Financial Institutions, attorneys from the Legislative Services Agency, and attorneys in private practice) to identify those provisions of Title 28 needing immediate repeal or revision. The efforts of the Committee and Drafting Group resulted in SEA 152, which addressed: (1) "structural" issues (primarily remaining branching and acquisition restrictions); (2) issues concerning the organization and operation of the Department of Financial Institutions; and (3) certain other issues relating to, *inter alia*, state bank parity with national banks, the reduction of regulatory burdens, and changes to state law necessitated by the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA).⁸

This Article reviews several of the significant changes to Title 28 resulting from SEA 152 and related legislation. Part I discusses changes in the permitted "structure" of banking in Indiana that result from the repeal of state law restricting branching and acquisitions. Part II identifies developments in state law that relate to savings associations. Part III reviews significant changes to the laws affecting the organization and operation of the Department of Financial Institutions (DFI). Part IV then analyzes several other notable statutory developments within Title 28. The Article states in conclusion that changes to Title 28 resulting from SEA 152 should mark the beginning of an effort to revise systematically and improve state law governing banks and other financial institutions.

I. BRANCHING AND ACQUISITION DEVELOPMENTS

A. *Intrastate Activity*

With the passage of Senate Bill 1 in 1985, Indiana state-chartered

7. Indiana Legislative Council Resolution adopted May 31, 1991 (unpublished document on file with the *Indiana Law Review*).

8. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, P.L. 101-73, 103 Stat. 183 (1989).

banks were allowed, subject to certain size⁹ and frequency limitations,¹⁰ to establish new branches in the county where the bank's principal office was located and in contiguous counties.¹¹ Senate Bill 1 also allowed bank holding companies to acquire existing branches located in any county in the state.¹² The acquisition of existing branches by both banks and bank holding companies was restricted, however, to branches which had been in operation for a period of at least five years.¹³ The five year rule was created to protect the "franchise value" of branches and to prevent banks from circumventing the contiguous-county-only branching limitation by acquiring newly created branches established solely to permit non-contiguous county branching. These restrictions on branching *de novo* and branching by acquisition¹⁴ reflected a policy determination that banks should be required to buy their way into a new market, except in instances where a new market could be entered by contiguous county expansion.

Under federal law, national banks located in Indiana are permitted to establish and operate branches to the same extent state-chartered institutions are permitted to do so. This branching rule, commonly known as the McFadden Act,¹⁵ is designed to create parity between national

9. The 1985 Act created a deposit ceiling limiting the amount of Indiana deposits that could be held by any bank or bank holding company. Under the ceiling restriction, no bank or bank holding company was permitted to acquire a bank or bank holding company if, following the acquisition, the bank or group of banks under common control would hold a percentage of total deposits in Indiana greater than 10% if the acquisition occurred prior to July 1, 1986, greater than 11% if the acquisition occurred after June 30, 1986 and before July 1, 1987, and 12% if the acquisition occurred after June 30, 1987. Pub. L. No. 265-1985, §§ 3, 4 (codified at IND. CODE §§ 28-2-13-19(d),(e), 28-1-13-20(c), 28-2-14-11(a),(b) (1988)), *repealed by* Pub. L. No. 33-1991, §§ 57, 61.

10. Under the 1985 Act, the number of branches that a bank could establish within the five year period beginning July 1, 1985 and ending June 30, 1990 in contiguous counties was limited by the amount of the bank's deposits. Pub. L. No. 265-1985, § 3 (codified at IND. CODE § 28-2-13-20(g) (1988)), *repealed by* Pub. L. No. 33-1991, § 57.

11. Pub. L. No. 265-1985, § 3 (codified at IND. CODE §§ 28-1-13-19, 28-2-13-20 (1988)), *repealed in part and amended by* Pub. L. No. 33-1991, §§ 25, 57.

12. Pub. L. No. 265-1985, § 4 (codified at IND. CODE § 28-2-14-10 (1988)), *amended by* Pub. L. No. 33-1991, § 30.

13. Pub. L. No. 265-1985, §§ 3-5 (codified at IND. CODE §§ 28-2-13-20(d), 28-2-14-11(c), 28-2-15-18(c) (1988)), *repealed by* Pub. L. No. 33-1991, § 57; Pub. L. No. 279-1987, § 13.

14. "Branch by acquisition" and "branch de novo" are defined terms under Title 28, added by the 1985 Act. Pub. L. No. 265-1985 § 3 (codified at IND. CODE §§ 28-2-13-8, -9 (1988)).

15. The McFadden Act, ch. 89, § 23, 48 Stat. 189, 190 (1933)(codified at 12 U.S.C. § 36 (1988)), amended the National Bank Act to permit national banks to acquire and establish branches to the same extent allowed state-chartered banks under state law. More artfully stated, the McFadden Act "confers authority on the Comptroller to approve

and state-chartered banks. Although the McFadden Act is designed to promote parity, it has been construed to permit national banks more expansive branching authority than state-chartered banks. This disparity has resulted from the Act's definition of the term "state bank." Under the Act a state bank is any "corporation or institution carrying on the banking business under the authority of State law."¹⁶ Focusing on this definition, the power of national banks to establish new branches in several states has been extended to include not only the power to branch to the same extent as state-chartered commercial banks, but also to branch to the same extent allowed state-chartered savings associations. The Comptroller of the Currency has permitted these expanded branching powers based upon the argument advanced by national banks that because savings associations actually compete with commercial banks for customer deposits and loans they are "carrying on the business of banking." As such, state-chartered savings associations are "state banks" within the meaning of the McFadden Act.

This argument was first made successfully by Deposit Guaranty National Bank of Jackson, Mississippi. In *Department of Banking & Consumer Finance v. Clarke (Deposit Guaranty)*,¹⁷ the Fifth Circuit Court of Appeals found, based on the definition of state bank contained in the McFadden Act and a Mississippi law that permitted savings associations to establish and operate branches throughout the state,¹⁸ that the Comptroller had properly found that Deposit Guaranty could establish and operate branch offices without being subject to the state's bank branching restrictions.¹⁹

Based on the result reached in the *Deposit Guaranty* case, INB National Bank of Indianapolis, Marion County, Indiana in June of 1987, filed an application with the Comptroller of the Currency seeking to establish a branch in Bloomington, Monroe County, Indiana. Although under then existing Indiana branching restrictions for state-chartered banks, INB would not have been permitted to establish branches in Bloomington;²⁰ like Mississippi law, Indiana law permitted building and

national bank branches to the extent allowed by state branching restrictions." *Colorado State Banking Bd. v. Resolution Trust Corp.*, 926 F.2d 931, 945 (10th Cir. 1991).

16. 12 U.S.C. § 36(h) (1988).

17. 809 F.2d 266 (5th Cir.), *cert. denied*, 483 U.S. 1010 (1987).

18. MISS. CODE ANN. § 81-12-175 (1973).

19. *Deposit Guaranty*, 809 F.2d at 271. Commercial banks in Mississippi were permitted to establish and operate branches only in the county where the bank's principal office was located or within a one-hundred mile radius of such office. MISS. CODE ANN. § 81-7-7 (1973).

20. A branch located in Bloomington, Monroe County, would not have been contiguous to Marion County, INB's principal place of business, and therefore would have violated then existing branching rules contained in the Indiana Code. *See* IND. CODE §§ 28-2-13-1 to -25 (1988 & Supp. 1991).

loan associations²¹ to branch statewide. The Comptroller approved INB's application and, as in the *Deposit Guaranty* case, the Comptroller's decision was challenged in federal court by the state bank regulator, the Department of Financial Institutions. The federal district court, in a decision handed down only a few weeks prior to the beginning of the 1991 legislative session,²² determined, based on *Deposit Guaranty* and subsequent cases,²³ that INB was not subject to the state-chartered bank branching restrictions, but instead could establish and operate branches on a statewide basis, based on the authority of building and loan associations to branch statewide.²⁴

In response to the INB case, the DFI, the Community Bankers Association, the Indiana Bankers Association, and others sought the repeal of the state's restrictions on statewide *de novo* branching by state-chartered banks to provide for state-chartered banks the same power to establish branches as possessed by national banks. The repeal was accomplished by SEA 152 which removed, effective May 12, 1991, the contiguous-county-only restriction on branching.²⁵ SEA 152 also repealed the five year rule with respect to branching by acquisition in connection with intrastate acquisitions,²⁶ but left the five year rule intact in the context of interstate acquisitions.²⁷ As a result of these changes, an Indiana state-chartered bank can branch statewide, either *de novo* or by acquisition.

In addition to permitting Indiana state-chartered banks to branch into contiguous counties, the 1985 legislation permitted Indiana banks, regardless of their location in the state, to affiliate under multi-bank holding companies.²⁸ Branching by acquisition, either by direct bank acquisitions or indirectly through the acquisition of a holding company, was permitted on a statewide basis by Senate Bill 1. Such acquisitions, while not limited by geography, were subject to certain other limitations,

21. Building and loan associations were permitted to open and establish branch offices statewide as a result of amendments to Indiana Code § 28-4-3-2(a) in 1987 which eliminated prior restrictions permitting branching only within the limits of the county in which the association's principal office was located and within 100 miles of the principal office. Pub. L. No. 277-1987, § 6.

22. *Community Bankers Ass'n v. Clarke*, 766 F. Supp. 1519 (S.D. Ind. 1990).

23. *Independent Bankers Ass'n v. Clarke*, 917 F.2d 1126 (8th Cir. 1990); *Texas v. Clarke*, 690 F. Supp. 573 (W.D. Tex. 1988); *Volunteer State Bank v. National Bank of Commerce*, 684 F. Supp. 964 (M.D. Tenn. 1988).

24. *Community Bankers Ass'n*, 766 F. Supp. at 1529.

25. Pub. L. No. 33-1991, §§ 57, 58.

26. *Id.* § 57.

27. See IND. CODE § 28-2-15-18(a)(2) (Supp. 1991) (five year rule for regional bank holding companies); IND. CODE § 28-2-16-16(a)(2) (Supp. 1991) (five year rule for foreign bank holding companies).

28. Pub. L. No. 265-1985, § 4 (codified as amended at IND. CODE § 28-2-14-10 (1988)).

including a deposit ceiling.²⁹ The deposit ceiling contained in the 1985 legislation prohibited a transaction if the surviving entity would hold more than a designated percentage of the total deposits in Indiana.³⁰ In anticipation of the effective date of statutory provisions permitting foreign holding companies, regardless of their principal place of business, to acquire Indiana banks,³¹ the general assembly included in SEA 152 a repeal of the deposit ceiling.³² Although limitations on concentration may arise from other laws, with the repeal of the state's deposit ceiling, Title 28 no longer directly limits the size of banking entities.

With SEA 152's repeal of the contiguous-county-only branching restriction, the elimination of the five year rule for intrastate acquisitions, and the removal of the deposit ceiling, the only remaining general state-law restrictions are those relating to interstate acquisitions. For interstate acquisitions, the five year rule and certain other restrictions remain in place.

B. Interstate Activity

The Douglas Amendment to the Bank Holding Company Act³³ prohibits the Federal Reserve Board "from approving an application of a bank holding company or bank located in one State to acquire a bank located in another State . . . unless the acquisition is specifically authorized by the statute laws of the State in which such Bank is located."³⁴ Restated, the Douglas Amendment prohibits bank acquisitions outside of the state in which the acquiror's principal operations are conducted, unless the acquisition is specifically authorized by the laws of the state in which the target bank is located.

Beginning with Massachusetts in 1982, several states adopted legislation "lifting the Douglas Amendment ban on interstate acquisitions on a reciprocal basis within their geographic regions."³⁵ The constitutionality of these state reciprocity laws was the subject of the United States Supreme Court decision in *Northeast Bancorp, Inc. v. Board of Governors*.³⁶ In *Northeast Bancorp*, the Court upheld the constitutionality of Massachusetts's and Connecticut's reciprocity laws allowing out-of-

29. See *supra* note 9.

30. See *supra* note 9.

31. Pub. L. No. 279-1987, § 9 (codified at IND. CODE § 28-2-16-1 to -25 (1988 & Supp. 1991)) (effective July 1, 1992).

32. See *supra* note 9.

33. Bank Holding Company Act of 1956, ch. 240, § 3(d), 70 Stat. 133 (1956) (codified at 12 U.S.C. § 1842(d) (1988)).

34. See *Northeast Bancorp., Inc. v. Board of Governors*, 472 U.S. 159, 163 (1985).

35. *Id.* at 164.

36. 472 U.S. 159 (1985).

state holding companies with their principal places of business in another New England state to acquire an in-state bank provided that the state of the acquiror's principal place of business accorded equivalent reciprocal privileges.³⁷ Since the *Northeast Bancorp* decision was handed down, all but a few states have adopted legislation which permits some form of interstate banking.³⁸

Indiana has permitted to a limited extent regional bank acquisitions since the passage of Senate Bill 1 in 1985.³⁹ Senate Bill 1 permitted bank holding companies located in Kentucky, Illinois, Michigan, and Ohio to acquire Indiana banks if the respective laws of these surrounding states permitted Indiana holding companies to acquire banks in these states, i.e., if there is reciprocity.⁴⁰ Because interstate branching remains prohibited, entry into the Indiana banking market continues to be only by acquisition. The five year rule, which bars a holding company from acquiring a bank that is not at least five years old, will remain in effect for interstate holding company acquisitions.⁴¹

Indiana's laws regulating "regional bank holding companies" were supplanted by the general assembly in 1987 with provisions regulating "foreign bank holding companies."⁴² The 1987 legislation created a "reciprocal national trigger" which allows foreign bank holding companies to acquire Indiana banks, provided that the laws of the state of the foreign holding company's principal place of business permit an Indiana holding company to acquire a bank in that state.⁴³ The 1987 legislation permitting interstate banking nationally (subject to reciprocity) takes effect July 1, 1992.⁴⁴

II. SAVINGS ASSOCIATIONS

In addition to revising bank branching and acquisition rules, SEA 152 permits state-chartered banks to establish branches through certain transactions with savings associations.⁴⁵ Additions to Title 28's bank branching chapter by SEA 152 provide that state-chartered banks may, upon receiving the necessary regulatory approvals, establish branches

37. *Id.* at 178.

38. See *Oregon's Trigger Gets Pulled*, BANKING EXPANSION REP., Oct. 2, 1989, at 2 (containing table categorizing and listing various state laws concerning interstate banking).

39. Pub. L. No. 265-1985, § 4 (codified at IND. CODE §§ 28-2-15-1 to -29 (1988)), repealed by Pub. L. No. 279-1987, § 13 (effective July 1, 1992).

40. IND. CODE § 28-2-15-18(e) (Supp. 1991) (repealed effective July 1, 1992).

41. *Id.* § 28-2-16-16(a)(2) (effective July 1, 1992).

42. Pub. L. No. 279-1987, §§ 9, 13.

43. IND. CODE § 28-2-16-16(b) (Supp. 1991) (effective July 1, 1992).

44. Pub. L. No. 279-1987, § 15.

45. Pub. L. No. 33-1991, § 61 (codified at IND. CODE § 28-2-13-20.5 (Supp. 1991)).

through transactions with savings associations if the transactions are identified in section 5(d)(2)(C) or (d)(3) of the Federal Deposit Insurance Act.⁴⁶ Subsections 5(d)(2)(C) and (d)(3), in turn, identify exceptions to FIRREA's five year moratorium on the conversion of savings institutions to banks and vice versa.⁴⁷

Section 5(d)(2)(C) provides that the Federal Deposit Insurance Corporation (FDIC) may approve a conversion transaction between a savings association and a bank if the transaction: (i) affects an insubstantial portion of the deposits of each depository institution to the transaction;⁴⁸ (ii) occurs in connection with a troubled savings association;⁴⁹ or (iii) occurs in connection with a troubled bank.⁵⁰ Section 5(d)(3) contains the "Oakar Transaction"⁵¹ exception to the moratorium which permits a bank holding company which controls a savings association to merge the savings institution into a subsidiary commercial bank with appropriate regulatory approval.⁵²

Like many changes to Title 28, this addition to the chapter on branching is designed to promote competitive equality between state-chartered banks and national banks by permitting state-chartered banks to establish branches through conversion transactions with savings associations to the same extent allowed national banks under federal law.

In addition to amending Title 28 to permit certain conversion transactions, SEA 152 also amended Title 28 to make Indiana law consistent with federal law concerning the use of the term "bank" in the corporate name of savings associations.⁵³ These statutory changes, like those concerning branching, were designed to create parity between state and federally chartered institutions.

46. 12 U.S.C. § 1815 (1988 & Supp. I 1989).

47. Pub. L. No. 101-73, § 206(a)(7), 103 Stat. 183, 196 (1989) (codified at 12 U.S.C. § 1815(d)(2)(A)(ii) (1988 & Supp. I 1989)) (imposing five year moratorium on conversion transactions between institutions insured by the Savings Association Insurance Fund (SAIF), 12 U.S.C. § 1821(a)(6) (1988 & Supp. I 1989), and institutions insured by the Bank Insurance Fund (BIF), 12 U.S.C.A. § 1821(a)(5) (1988 & Supp. I 1989)).

48. 12 U.S.C. § 1815(d)(2)(C)(i) (1988 & Supp. I 1989). For purposes of subsection 5(d)(2)(C)(i), an insubstantial portion of deposits is less than 35% of the lesser of (i) total deposits on hand on May 1, 1989 and net interest on such deposits from May 1, 1989 to the date of conversion or (ii) total deposits on the date of a transfer of deposits as a result of conversion. *Id.* § 1815(d)(2)(D).

49. *Id.* § 1815(d)(2)(C)(ii) (requiring findings by FDIC and Resolution Trust Corporation (RTC) that SAIF member institution is in default or in danger of default and that estimated financial benefits exceed costs).

50. *Id.* § 1815(d)(2)(C)(iii) (requiring FDIC finding with respect to BIF institutions similar to that required by FDIC and RTC for SAIF institutions under subsection (C)(ii)).

51. The provision which is now § 5(d)(3) is the result of an amendment to FIRREA sponsored by Representative Oakar of Ohio.

52. 12 U.S.C. § 1815(d)(3) (1988 & Supp. I 1989).

53. Pub. L. No. 33-1991, § 19 (amending IND. CODE § 28-1-20-4 (1988)).

III. DEPARTMENT OF FINANCIAL INSTITUTIONS DEVELOPMENTS

One of the most prominent features of SEA 152 is its addition of Article 11 to Title 28.⁵⁴ The new Article is in large part a collection of several predecessor sections of Title 28 describing the organization, operation, and authority of the Department of Financial Institutions. The new Article does, however, change prior law in several respects.

The most notable changes resulting from new Article 11 are those relating to the DFI's enforcement powers. SEA 152 adds a chapter outlining the enforcement powers of the DFI.⁵⁵ The chapter contains its own "due process" provisions that exempt the DFI from other provisions of the Indiana Code which apply to administrative actions generally.⁵⁶ Enforcement powers can be invoked by the DFI by bringing notice of charges against either a financial institution or its officers or directors.⁵⁷ Orders can require an institution, its officers, directors, employees, and agents to cease and desist from certain practices or violations and, in appropriate circumstances, to take affirmative action to correct conditions resulting from prior practices and violations.⁵⁸ The chapter also grants to the DFI the power to impose civil penalties upon officers and directors of an institution for violations of final orders issued by the DFI.⁵⁹ Both the civil penalty provisions and the ability of the DFI to issue orders requiring affirmative action parallel relatively recent changes made to federal banking law by FIRREA.⁶⁰

Another notable change to Title 28 resulting from SEA 152 is expansion of the DFI's power to examine bank "affiliates." Prior to the adoption of SEA 152, transactions between affiliates of state-chartered banks or trust companies were governed by Indiana Code chapter 28-

54. *Id.* § 56 (codified at IND. CODE §§ 28-11-1-1 to -4-1 (Supp. 1991)).

55. IND. CODE §§ 28-11-4-1 to -9 (Supp. 1991).

56. Indiana Code § 28-11-4-1 exempts the DFI from the requirements of Indiana Code art. 4-21.5, except with respect to judicial review of a final order of the DFI.

57. IND. CODE § 28-11-4-2 (Supp. 1991) (as added by Pub. L. No. 33-1991, § 56) (notice of charges against a financial institution); *id.* § 28-11-4-3 (notice of charges against a director or officer).

58. *Id.* § 28-11-4-6 (temporary order); *id.* § 28-11-4-7 (as added by Pub. L. No. 33-1991, § 56) (final order).

59. *Id.* § 28-11-4-9 (as added by Pub. L. No. 33-1991, § 56).

60. Section 204 of FIRREA, Pub. L. No. 101-73, 103 Stat. 193 (1989), added the new term "institution-affiliated party" to 12 U.S.C. § 1813(u) and substituted the term throughout the Federal Deposit Insurance Act for the terms that had previously been used to designate parties subject to agency enforcement orders and against whom civil money penalties for violations of federal banking laws and other "unsafe and unsound practices" could be assessed. An "institution-affiliated party," like any federally insured financial institution, is subject to the full range of federal bank regulatory powers. Such powers were expanded significantly by FIRREA and allow regulators to, *inter alia*, assess civil

1-18.1. This chapter overlapped and conflicted with sections 23A and 23B of the Federal Reserve Act, the federal law regulating transactions among affiliates.⁶¹ To avoid having state-chartered institutions subject to overlapping and, in some respects, conflicting laws, chapter 18.1 was repealed and replaced with new chapter 18.2.⁶² The new chapter carries over certain provisions of prior law and provides that violations of sections 23A and 23B of the Federal Reserve Act by non-Federal Reserve member banks constitute violations of state law for which DFI enforcement action may be appropriate. The new chapter includes the definition of "affiliate" contained in the old chapter⁶³ and grants to the DFI the same power to examine "affiliates" as exists for the examination of the affairs of banks or trust companies.⁶⁴

IV. OTHER DEVELOPMENTS

Along with making important changes to Indiana banking law in the areas of branching, acquisitions, and regulatory enforcement, SEA 152 made several other significant changes to Title 28. These other changes included new and revised Indiana Code provisions regarding the chartering of new institutions, changes in bank control, office relocations and real estate lending, as well as technical amendments throughout Title 28 conforming state law to recent changes in federal banking law.

Prior to SEA 152, Title 28 required that the DFI find "public necessity" before chartering a new financial institution and that it hold a hearing in connection with each new charter application. Prior law also contained minimum capital guidelines based on the size of the community where the new institution was to operate. SEA 152 eliminates each of these requirements. In place of the "public necessity" requirement for new institutions, SEA 152 requires that the DFI consider only the "convenience, needs, and future earnings prospects for the [new] financial institution."⁶⁵ SEA 152 also eliminated the mandatory hearing require-

money penalties and issue cease and desist orders requiring affirmative actions to be taken by an institution as well as its institution-affiliated parties. For an overview of the enhanced enforcement powers granted to federal regulators by FIRREA, see Daniel B. Gail & Joseph J. Norton, *A Decade's Journey from "Deregulation" to "Supervisory Reregulation": The Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, 45 BUS. LAW. 1103, 1188-1206 (1990).

61. 12 U.S.C. §§ 371c, 371c-1 (1988).

62. Pub. L. No. 33-1991, §§ 18, 57.

63. Cf. IND. CODE § 28-1-18.1-1 (1988) (repealed effective May 12, 1991); IND. CODE § 28-1-18.2-1 (Supp. 1991) (effective May 12, 1991).

64. IND. CODE § 28-1-18.2-4(a) (Supp. 1991) (as added by Pub. Law No. 33-1991, § 18).

65. IND. CODE § 28-1-2-26 (Supp. 1991) (as amended by Pub. L. No. 33-1991, § 7).

ment; the DFI "may" hold a hearing.⁶⁶ Minimum capital guidelines for banks were also eliminated, but such guidelines remain in effect for state-chartered savings associations.⁶⁷ Under the new law the "minimum amount of the capital stock" of a new bank or trust company is to be determined "by the department after giving consideration to the potential deposit liability."⁶⁸

In addition to revising statutes governing the chartering of new institutions, SEA 152 amended laws governing changes in control of existing institutions. Under the federal Change in Bank Control Act⁶⁹ a person or a group of persons acting in concert must give notice to the Federal Deposit Insurance Corporation before acquiring more than twenty-five percent of the voting shares of a federally insured depository institution. Prior to SEA 152, the corresponding state law provisions required DFI pre-approval of changes in control of state banks and trust companies—defined as the acquisition of a majority of outstanding capital stock of an institution. SEA 152 brings state law closer into conformity with federal law by lowering the threshold for a change-in-control from fifty percent to twenty-five percent, establishing time frames for the DFI's approval process and identifying factors the DFI should consider in approving an application.⁷⁰

State laws governing the location of an institution's principal office were also altered by SEA 152. Prior to the removal of restrictions on statewide branching by SEA 152, the DFI took the position that a state-chartered financial institution could not move its "principal office" outside of its home county.⁷¹ All relocations were also subject to DFI approval.⁷² This was inconsistent with the law applicable to national banks which permitted the relocation of a bank's main office, provided that it did not involve moving the main office more than thirty miles from the borders of the bank's hometown.⁷³ In 1990, the DFI retreated from its position that main office relocations could not occur outside of a bank's home county by allowing Fifth Third Bank of Central Indiana to relocate its main office from Hancock County to Marion

66. *Id.* § 28-1-2-22 (as amended by Pub. L. No. 33-1991, § 3).

67. *Id.* § 28-1-4-12 (as amended by Pub. L. No. 33-1991, § 11).

68. *Id.*

69. Pub. L. No. 95-630, § 602 (codified as amended at 12 U.S.C. § 1817(j) (1988)).

70. IND. CODE § 28-1-2-23 (Supp. 1991) (as amended by Pub. L. No. 33-1991, § 4).

71. This position was based on the DFI's interpretation of Indiana Code § 28-1-5-3 (1988), which provided (prior to SEA 152) that "[e]very corporation shall maintain an office or place of business in this state, which shall be known as the 'principal office,' and which shall be located in the county in which such corporation conducts business."

72. *See supra* note 71.

73. 12 U.S.C. § 30(b) (1988).

County. This change in policy was carried over into amendments to Title 28's provisions concerning an institution's principal office.⁷⁴ Under the revised provisions, Indiana law provides that an institution's principal office can be located in any county in the state where the institution conducts business.⁷⁵ Like prior law, however, DFI approval of any principal office relocation is required.⁷⁶

Prior to the passage of SEA 152 state-chartered banks periodically had been criticized by the DFI for non-compliance with Code provisions concerning loans secured by real estate. SEA 152 repealed these provisions and added new provisions under which a state bank may make any loan secured by real estate that a national bank can make.⁷⁷ SEA 152 also expanded real estate lending powers of state-chartered savings banks by permitting such banks to engage in real estate lending to the same extent as that permitted for commercial banks.⁷⁸ Rollover mortgages are also specifically authorized, but are subject to statutorily prescribed requirements and restrictions.⁷⁹

In addition to the revisions to Title 28 by SEA 152, the 1991 General Assembly also passed Senate Enrolled Act No. 153 (SEA 153)⁸⁰ which made numerous technical amendments to a variety of statutes. These amendments consisted almost entirely of revising existing statutes to reflect changes in federal law. Revisions resulting from SEA 153 include the elimination of references to the Federal Savings and Loan Insurance Corporation (FSLIC) and the Federal Home Loan Bank Board (FHLBB), the addition of appropriate references to the Office of Thrift Supervision (OTS), the FDIC and the FDIC's Savings Association Insurance Fund (SAIF) and Bank Insurance Fund (BIF), and stylistic and technical changes necessitated by the new references.

V. CONCLUSION

To continue the systematic revision of Title 28 begun by the Interim Study Committee on Financial Institutions and Consumer Credit ap-

74. See IND. CODE § 28-1-5-3 (Supp. 1991).

75. *Id.*

76. *Id.*

77. Pub. L. No. 33-1991, §§ 16, 57 (repealing IND. CODE § 28-1-13-7 (1988) and adding IND. CODE § 28-1-13-7.1 (Supp. 1991)). National banks, pursuant to § 24 of the Federal Reserve Act, 12 U.S.C. § 371 (1988), are permitted to "make, arrange, purchase, or sell" loans secured by real estate "subject to such terms, conditions, and limitations as may be prescribed by the Comptroller."

78. IND. CODE § 28-1-13-7.1(c) (Supp. 1991).

79. *Id.* § 28-1-13-7.1(e). The term "roll over mortgage" (ROM) as used in § 28-1-13-7.1 refers to a loan secured by a first mortgage on real property improved by a one to four family dwelling that can be refinanced at regularly scheduled times.

80. Pub. L. No. 8-1991.

pointed by the 1990 General Assembly, the 1991 General Assembly established, through House Enrolled Act No. 1141,⁸¹ a Financial Institutions Study Commission. The Commission is charged with an obligation to study, *inter alia*, the competitive position of Indiana financial institutions (with respect to both domestic and foreign competition), the role of such institutions in the Indiana economy, remaining legal restrictions on Indiana financial institutions that have a negative economic effect and which invite federal preemption, and proposals to revise and simplify Indiana law governing financial institutions.⁸² The creation of the Commission suggests that recent efforts to revise and improve Title 28 mark the beginning of an ongoing process to systematically reform Indiana laws regulating state-chartered financial institutions. The result of this should be continued and significant revision of state laws which define bank powers and affect the structure of banking in Indiana.

81. Pub. L. No. 239-1991.

82. *Id.* § 1(f).



1991 Federal Practice and Procedure Update for the Seventh Circuit Practitioner

JOHN R. MALEY*

INTRODUCTION

Indiana practitioners litigating in federal court continued to encounter significant developments in federal civil practice last year. Several key amendments were made to the Federal Rules of Civil Procedure effective December 1, 1991, local rules were amended in the Southern District of Indiana, Civil Justice Reform Plans were adopted in the Northern and Southern Districts of Indiana, and the Supreme Court, Seventh Circuit, and regional district courts rendered important decisions affecting many aspects of federal litigation. This Article, as the fourth of an annual section on federal civil practice, highlights the more important developments in an effort to assist local attorneys in their federal civil litigation.¹

Federal civil practice is noteworthy for the broad spectrum of procedural issues that often arise in getting to the merits of a case or controversy. As a result, this Article covers diverse topics such as subject matter jurisdiction, rules of pleading, discovery, trial rules, and post-judgment issues. The developments that this author deems of greatest importance are discussed in detail. Other issues are merely raised so that practitioners are aware of them.

The subjects are presented in the order in which they often arise in litigation. For ease of future reference, the following table of contents outlines the subjects discussed:

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1. As in past years, this Article concentrates on federal civil practice and procedure. Substantive federal decisions and matters of federal criminal procedure are left to other forums.

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I. DEVELOPMENTS IN SUBJECT MATTER JURISDICTION

A. Diversity Jurisdiction

Diversity jurisdiction generated a number of reported decisions during the survey period. As in past years, the Seventh Circuit somewhat sternly advised district judges and practitioners to address such jurisdictional questions early in litigation. For instance, in *Market Street Associates Limited Partnership v. Frey*,² the defendants removed an action to federal court on the basis of diversity jurisdiction, asserting in the removal papers that the plaintiff limited partnership was a Wisconsin entity based on its sole general partners' Wisconsin citizenship and that none of the plaintiffs was a Wisconsin domiciliary. The district court proceeded to address the merits of the action, apparently without delving further into jurisdiction.

On appeal, the parties' lawyers were confronted by the panel with the settled rule that in considering the citizenship of a limited partnership, the residence of *all* partners, including limited partners, must be considered. This had been the law in the Seventh Circuit since 1984,³ and was adopted as the law of the land by the Supreme Court in 1990.⁴ Writing for the *Market Street* panel, Judge Posner chastised counsel

2. 941 F.2d 588 (7th Cir. 1991).

3. *Elston Inv., Ltd. v. David Altman Leasing Corp.*, 731 F.2d 436 (7th Cir. 1984). *Accord* *Stockman v. LaCroix*, 790 F.2d 584 (7th Cir. 1986).

4. *Carden v. Arkoma Assoc.*, 494 U.S. 185 (1990). The *Carden* decision is discussed at length in last year's federal practice survey. See John R. Maley, 1990 *Federal Practice and Procedure Update for the Seventh-Circuit Practitioner*, 24 IND. L. REV. 631, 632-34 (1991) [hereinafter Maley, 1990 *Developments*].

noting, "Even when the appeal was argued, more than a year after *Carden* came down, the parties' lawyers were unaware of the rule; indeed they seemed astonished at the suggestion that the citizenship of the limited partners was relevant to jurisdiction."⁵

The Seventh Circuit ordered the parties to submit affidavits concerning diversity and determined that jurisdiction was, in fact, present. Judge Posner nonetheless added the following warning:

[B]y their *insouciance* concerning jurisdiction the litigants not only ran the risk of having to start the case over in state court but also made more work for us and delayed the decision of the appeal. We remind the bench and bar of this circuit that it is their nondelegable duty to police the limits of federal jurisdiction with meticulous care and to be particularly alert for problems in diversity cases in which one or more of the parties is neither an individual nor a corporation. For it is with respect to the other, the unconventional entities — two of which, a partnership and a trust, are involved in this case — that mistakes concerning the existence of diversity jurisdiction are most common. Among other unconventional entities that lawyers and judges in diversity should be wary of tripping over are joint ventures, joint stock companies, labor unions, religious and charitable organizations, municipal corporations and other public and quasi-public agencies, and the governing boards of unincorporated institutions.⁶

Thus, as pointed out in last year's federal practice article, extreme care must be taken in the Seventh Circuit to ensure that subject matter jurisdiction exists.⁷ If the district court does not raise the issue, which is unlikely,⁸ the Seventh Circuit obviously will.

In another significant decision, *General Railway Signal Co. v. Corcoran*,⁹ the Seventh Circuit held that a suit naming the administrator of a federal agency as a defendant cannot be rooted in diversity jurisdiction.¹⁰ In writing for the panel, Judge Easterbrook declined to follow a decision from the D.C. Circuit holding otherwise. Judge Easterbrook followed the general rule that the United States and its agencies cannot be sued in diversity, reasoned that a "suit against an agency administrator

5. *Market St. Assocs.*, 941 F.2d at 589-90.

6. *Id.* at 590.

7. Maley, 1990 *Developments*, *supra* note 4, at 637.

8. *E.g.*, *Lutkowski v. High Energy Sports*, 768 F. Supp. 224 n.1 (N.D. Ill. 1991) ("This Court always undertakes an immediate review of newly-filed complaints.").

9. 921 F.2d 700 (7th Cir. 1991).

10. *Id.* at 703.

is equivalent to a suit against the agency,” and added that a “contrary holding would undermine the longstanding rule that agencies cannot be citizens of any state for diversity purposes and would arbitrarily expand diversity jurisdiction over instrumentalities of the United States.”¹¹

In *Metropolitan Life Insurance Co. v. Estate of Cammon*,¹² the Seventh Circuit revisited the proper test to be used in determining the citizenship of corporations for diversity purposes. Recall that 28 U.S.C. § 1332(c)(1) provides that a corporation is deemed to be a citizen of the state in which it is incorporated and the state in which it has its “principal place of business.”¹³ No other statutory guidance is given, however, for determining what constitutes the principal place of business. The Seventh Circuit has followed the “nerve-center” approach, which holds that a corporation has a single principal place of business where its executive headquarters are located.¹⁴ In *Metropolitan Life*, the Seventh Circuit reaffirmed its commitment to the nerve-center approach, declining to follow other courts, such as the Ninth Circuit, that reject this concept.¹⁵

Finally, the Seventh Circuit also addressed the citizenship of individual litigants. In *Galva Foundry Co. v. Heiden*,¹⁶ an Illinois corporation sued its former president, Ray Heiden. Mr. Heiden had lived and worked in Illinois all his life. In 1966, he bought a second home in Florida and continued to vacation there. In 1988, Heiden quit the plaintiff’s company and sold his stock. That same year he registered to vote in Florida, took out a Florida driver’s license, listed Florida as his permanent address on his tax returns, and stated in an application for a Florida tax exemption that he was a Florida resident. In 1989, when the lawsuit was filed, Heiden continued to maintain his home in Illinois and spent the greater balance of the year there rather than in Florida. He retained his memberships in an Illinois country club and church.

Faced with these facts and a motion to dismiss from Heiden for want of diversity, the district court found Heiden to be a nondiverse Illinois resident and dismissed the action. The Seventh Circuit affirmed.¹⁷ Writing for the panel, Judge Posner began by noting that although there is no statutory definition of “citizenship” for an individual, the courts have held that it is the state of the individual’s domicile, and a district

11. *Id.* at 704-05.

12. 929 F.2d 1220 (7th Cir. 1991).

13. 28 U.S.C. § 1332(c)(1) (1988).

14. *E.g.*, *Kanzelberger v. Kanzelberger*, 782 F.2d 774 (7th Cir. 1986).

15. *Metropolitan Life*, 929 F.2d at 1223 (declining to follow *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090 (9th Cir. 1990)).

16. 924 F.2d 729 (7th Cir. 1991).

17. *Id.* at 731.

court's conclusion on domicile "must stand unless clearly erroneous."¹⁸ Judge Posner elaborated on the domicile standard, writing:

Unfortunately, in this age of second homes and speedy transportation, picking out a single state to be an individual's domicile can be a difficult, even a rather arbitrary, undertaking. Domicile is not a thing, like a rabbit or a carrot, but a legal conclusion, though treated as a factual determination for purposes of demarcating the scope of appellate review. And in drawing legal conclusions it is always helpful to have in mind the purpose for which the conclusion is being drawn. The purpose here is to determine whether a suit can be maintained under the diversity jurisdiction, a jurisdiction whose main contemporary rationale is to protect nonresidents from the possible prejudice that they might encounter in local courts.¹⁹

Applying this standard, the *Galva Foundry* court concluded that Heiden was an Illinois domiciliary, noting that he was a "long-time resident of Illinois and unlikely therefore to encounter hostility in its state courts."²⁰ Judge Posner interpreted Heiden's Florida declarations as steps to avoid Illinois taxes, and concluded, "[t]his is shady business but it cannot convert a suit between two residents of Illinois into a suit against a Floridian."²¹

B. Amount-In-Controversy Requirement

The current amount-in-controversy requirement for diversity jurisdiction is that the matter exceed the sum or value of \$50,000.²² As anticipated, the increase from \$10,000 to \$50,000 in 1988 appears to have resulted in a corresponding surge in decisions addressing the amount-in-controversy requirement.²³ Two decisions from the survey period reiterate the basic standards and address situations that recur with some frequency.

In *Sharp Electronics Corp. v. Copy Plus, Inc.*,²⁴ the plaintiff sued in diversity for \$15,000 in compensatory damages and an unspecified

18. *Id.* at 729.

19. *Id.* at 730.

20. *Id.*

21. *Id.* at 731.

22. 28 U.S.C. § 1332(a) (1988). A proposal was introduced in the Senate in 1991 to raise this to \$75,000. See S. 1494, 102d Cong., 1st Sess. (1991). The recommendation was not enacted.

23. See John R. Maley, 1989 *Developments in Federal Civil Practice Affecting Indiana Practitioners*, 23 IND. L. REV. 261-63, 263-66 (1990) [hereinafter Maley, 1989 *Developments*].

24. 939 F.2d 513 (7th Cir. 1991).

amount of punitive damages for fraud. The district court dismissed the action for want of diversity jurisdiction, reasoning that "any recovery of punitive damages was highly unlikely to be sufficient to bring the recovery within the jurisdictional prerequisite."²⁵

On appeal, the Seventh Circuit began by noting that the Supreme Court has long since determined that "[w]here both actual and punitive damages are recoverable under a complaint each must be considered to the extent claimed in determining the jurisdictional amount."²⁶ The question, in determining whether it "appear[ed] to a legal certainty that the claim is really for less than the jurisdictional amount," was thus whether the plaintiff could recover punitive damages under local law in view of the circumstances alleged.²⁷ Because the plaintiff could recover punitive damages under governing Wisconsin law, the Seventh Circuit could not say to a legal certainty that the suit was for less than the jurisdictional threshold, and the court thus reversed the judgment of the district court.

Judge Shadur of the Northern District of Illinois addressed similar issues in *Griffin v. Dana Point Condominium Association*,²⁸ holding that a woman with serious injuries from a slip-and-fall accident met the \$50,000 threshold, while at the same time dismissing her spouse's loss of consortium claim for insufficient damages.²⁹ The court noted that whenever the potential recovery is not susceptible to precise measurement, as is always the case in personal injury cases, "both the litigants and the court must be keenly aware of the need to establish at least a colorable basis" for meeting the amount-in-controversy requirement.³⁰ There was no dispute about the wife's claim, for she alleged medical expenses exceeding \$20,000, pain and suffering she valued in excess of \$40,000, and loss of quality of life and mental anguish she pegged at some \$20,000. By contrast, her spouse's consortium claim did not delineate the elements of damage, and the court reasoned that if the wife placed only a \$22,000 loss on lost quality of life, "there appears to be no predicate for assigning a much larger price tag (over \$50,000) to the intangible loss claimed by [her spouse]."³¹

Thus, depending upon whether a litigant desires to be in federal court or not, care must be taken in such situations to address amount-in-controversy issues in the framing of pleadings. In the *Griffin* setting,

25. *Id.* at 515 (paraphrasing district court's decision).

26. *Id.* (quoting *Bell v. Preferred Life Soc'y*, 320 U.S. 238, 240 (1943)).

27. *Id.*

28. 768 F. Supp. 1299 (N.D. Ill. 1991).

29. *Id.* at 1301.

30. *Id.*

31. *Id.* at 1301 n.3.

for example, it appears that the husband could have kept his claim in federal court had he gone into more detail in delineating his damages and had his wife been less specific (or less conservative) about her intangible damages. In the punitive damages setting, by contrast, no specification of the amount of damages appears necessary under *Sharp Electronics*. However, for plaintiffs that prefer to remain in state court and who believe their chances of obtaining a sizeable punitive damages award are slim in their particular cases, removal could possibly be defeated by requesting total compensatory and punitive damages of \$50,000 or less. Plaintiffs' attorneys are reminded, however, that in Indiana no specific dollar prayer may be made for personal injuries, wrongful death, or punitive damages.³²

C. Supplemental Jurisdiction

As reported last year, Congress codified the concepts of pendent claim and pendent party jurisdiction by creating "supplemental jurisdiction" under 28 U.S.C. § 1367.³³ This statute provides that when the district courts have original jurisdiction over a claim, they also have "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III."³⁴ Although the statute appears clear on its face, questions remain, several of which were addressed in this circuit during the survey period.

For instance, one issue is whether a plaintiff who has no independent basis of original jurisdiction can join a related action with a co-plaintiff under supplemental jurisdiction. Section 1367(a) initially seems to indicate that this is possible, for it provides: "Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties."³⁵ A reported decision from the Northern District of Illinois, however, holds otherwise.

Specifically, in *Griffin v. Data Point Condominium Association*, discussed above in the amount-in-controversy context, Judge Shadur held that the husband's consortium claim, which did not meet the \$50,000 threshold, could not find its way into court based on supplemental jurisdiction.³⁶ The court acknowledged it had previously suggested to the parties the possibility that section 1367 might save the consortium claim,

32. IND. R. TR. PROC. 8(a)(2).

33. See Maley, 1990 *Developments*, *supra* note 4, at 644-46.

34. 28 U.S.C.A. § 1367(a) (West Supp. 1991).

35. *Id.*

36. *Griffin v. Data Point Condominium Ass'n*, 768 F. Supp. 1299, 1301 (N.D. Ill. 1991).

but concluded that "a close look at both the language of the statute and its legislative history teaches that the new provision does not change the old law in this area at all."³⁷ The court relied primarily on *Zahn v. International Paper Co.*,³⁸ wherein the Supreme Court held that claims of different plaintiffs asserting their individualized claims cannot be aggregated to satisfy the jurisdictional amount.³⁹ From this presupplemental jurisdiction holding dealing with the amount-in-controversy requirement, Judge Shadur apparently extrapolated that in the supplemental jurisdiction setting "each plaintiff's claim must be considered on its own as though it were a separate lawsuit."⁴⁰ Judge Shadur added in a footnote that the House Report on supplemental jurisdiction indicates that *Zahn* is not intended to be affected by section 1367.⁴¹

Judge Shadur seems correct in his ultimate decision, though his analysis does not entirely stick to the "language of the statute" as promised. The *Zahn* decision dealt only with aggregating claims of different parties to reach the \$50,000 threshold, although the broader principle that a plaintiff must have his own basis of original jurisdiction can reasonably be drawn from the Court's opinion. The result in *Griffin* might be more directly supported by section 1367(b), which provides that when original jurisdiction is founded solely on diversity, supplemental jurisdiction is not proper over claims made by plaintiffs against parties joined under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure.⁴² Note that in the *Griffin* context it is the plaintiff without original jurisdiction that attempts to get into court in the first place, rather than an original jurisdiction plaintiff trying to get additional defendants into court. In a sense, the second plaintiff can be viewed as an intervener under Rule 24 or a party whose joinder is needed under Rule 19, and according to section 1367(b), such intervention or joinder is ordinarily improper in the diversity context.

The bedrock of *Griffin* could also be that supplemental jurisdiction, a concept not fully defined by Congress, simply does not encompass claims made by related plaintiffs that do not enjoy their own source of original jurisdiction. The only definition of supplemental jurisdiction, implicit though it may be, is found in section 1367(a), which states that in any action of which the district courts have original jurisdiction, the district courts shall have "supplemental jurisdiction over all other claims

37. *Id.* at 1301.

38. 414 U.S. 291, 292-95 (1973).

39. *Id.* at 299.

40. *Griffin*, 768 F. Supp. at 1301.

41. *Id.* at 1302 n.4 (citing H.R. Rep. No. 734, 101st Cong. 2d Sess. 76-77 (1990), reprinted in 1990 U.S.C.C.A.N. 6802).

42. 28 U.S.C.A. § 1367(a) (West Supp. 1991).

that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III.”⁴³ The first element of this test (an action over which the court has original jurisdiction) would seem to be satisfied in the *Griffin* setting, for the wife’s claim was properly before the court on diversity. What might not be satisfied is the constitutional standard of being so closely related to the original jurisdiction claims that Article III is satisfied.

This issue is a highly technical one that need not (and cannot) be resolved here. For Seventh Circuit practitioners, the important points are that supplemental jurisdiction embodies the former concepts of ancillary and pendent jurisdiction and that the requirements for invoking supplemental jurisdiction, particularly in the diversity context, require study prior to filing. An excellent and concise review of section 1367 is found in the Practice Commentary following this statute in the United States Code Annotated.⁴⁴ The Commentary is highly recommended as a starting point for those confronting these issues.

Supplemental jurisdiction was invoked rather routinely in a number of reported decisions. For instance, in *Corporate Resources, Inc. v. Southeast Suburban Ambulatory Surgical Center, Inc.*,⁴⁵ the plaintiff sued nine diverse defendants. Original jurisdiction existed only as to four of the defendants because the claims against the others did not exceed \$50,000. The district court nonetheless exercised supplemental jurisdiction under section 1367, finding that the claims derived from the same common nucleus of operative facts as those in the original jurisdiction claims and that exercising full jurisdiction would be in the interests of judicial economy.⁴⁶

Similarly, in *American Pfauter, Ltd. v. Freeman Decorating Co.*,⁴⁷ the district court chose to exercise supplemental jurisdiction over a defendant that was not named as a federal question defendant. Six defendants were named, with all but one of them sued under the Carmack Amendment.⁴⁸ The sixth defendant was sued under a related state law contractual claim. Judge Aspen addressed the discretionary exceptions to exercising supplemental jurisdiction under section 1367(c), particularly subsection (c)(2)’s exception where the state-law claim “substantially predominates” over the federal claim.⁴⁹ Judge Aspen found that the

43. *Id.*

44. See Daniel D. Siegel, *Practice Commentary — The 1990 Adoption of § 1367, Codifying “Supplemental Jurisdiction,”* reprinted in 28 U.S.C.A. § 1367, at 219 (West Supp. 1991).

45. 774 F. Supp. 503 (N.D. Ill. 1991).

46. *Id.* at 506.

47. 772 F. Supp. 1071 (N.D. Ill. 1991).

48. 49 U.S.C. § 11707 (1988).

49. 28 U.S.C.A. § 1367(c)(2) (West Supp. 1991).

state law claim did not so overwhelm the federal claim and thus, retained jurisdiction over the sixth defendant.⁵⁰

Finally, it was noted last year that supplemental jurisdiction was created to override the Supreme Court's anti-pendent party decision in *Finley v. United States*,⁵¹ and that because section 1367 was enacted December 1, 1990, and made effective to actions commenced on or after that date, there exists a gap in pendent party jurisdiction for all actions predating December 1, 1990.⁵² This was confirmed during the survey period by Judge Gordon of the Eastern District of Wisconsin in *McGraw-Edison Co. v. Speed Queen Co.*⁵³ After determining that pendent party jurisdiction did not exist under CERCLA,⁵⁴ Judge Gordon also declined to invoke supplemental jurisdiction over a pendent party because the action had been filed in June of 1990, "well before the December 1, 1990, effective date of the statute."⁵⁵

Because there are still hundreds if not thousands of pre-December 1, 1990, actions pending in the Seventh Circuit, the bench and bar should still be on the lookout for erroneously placed pendent party claims. Despite the apparent harshness of the rule, such claims cannot lie in federal court, and if they are not dismissed at the district court level, they most surely will be in the Seventh Circuit. Practitioners need not panic, however, for in Indiana, such claims can be refiled in state court under Indiana's savings statute.⁵⁶

D. Removal

Several removal issues were addressed during the survey period. These are merely highlighted so that practitioners are aware of the developments:

1. Removal was allowed even after the one-year jurisdictional limitation of 28 U.S.C. § 1446(b) had expired where the defendant had once removed to federal court in a timely fashion, the plaintiff had later added a diversity-destroying defendant leading to a remand, that defendant was voluntarily dismissed after the one-year period had expired,

50. *American Pfauter*, 772 F. Supp. at 1073.

51. 490 U.S. 545 (1990).

52. Maley, 1990 *Developments*, *supra* note 4, at 645.

53. 768 F. Supp. 684 (E.D. Wis. 1991).

54. 42 U.S.C. §§ 9601-9675 (1988 & Supp. I 1989).

55. *McGraw-Edison*, 768 F. Supp. at 688.

56. See IND. CODE § 34-1-2-8 (1988); *Huffman v. Anderson*, 118 F.R.D. 97, 100 (N.D. Ind. 1987); *Torres v. Parkview Foods*, 468 N.E.2d 580, 582-83 (Ind. Ct. App. 1984).

and the diverse defendant then promptly sought removal a second time.⁵⁷

2. 28 U.S.C. § 1446(b) contains a mandatory thirty day period for removing an initially non-removable action after notice of a paper from which it may first be ascertained that the case is removable; this thirty day period begins to run when a defendant is able reasonably and intelligently to conclude that federal jurisdiction is present, and in actions without a specific prayer, "it is unreasonable to expect the defendant to calculate with any amount of certainty the claims of the plaintiff."⁵⁸
3. The right of removal of a federal question or diversity action is fixed upon compliance with the statutory requirements, and removal cannot be denied based on the state court's concurrent jurisdiction.⁵⁹
4. Defects in removal procedure, but not subject matter jurisdiction, are ordinarily waived unless raised within thirty days.⁶⁰
5. Fees and costs may be ordered upon remand of a case improperly removed, and such fees and costs can be ordered even after the order of remand is issued.⁶¹
6. An award of fees and costs on remand is generally inappropriate if the defendant raised legitimate and substantial grounds for removal and asserted them in the best of faith.⁶²
7. Fees and costs were imposed where the defendants could have easily ascertained "with minimal research" that removal was clearly improper.⁶³
8. In personal injury and other such cases where local law prohibits a specific *ad damnum*, removal is not guaranteed, and the removing party should indicate in the removal notice that the jurisdictional amount has been satisfied.⁶⁴

57. *Kite v. Richard Wolf Medical Instruments Corp.*, 761 F. Supp. 597 (S.D. Ind. 1989).

58. *Roberson v. Orkin Exterminating Co.*, 770 F. Supp. 1324, 1329 (N.D. Ind. 1991) (quoting *Smith v. Executive Life Ins. Co.*, 651 F. Supp. 269, 271 (M.D. La. 1986)).

59. *Pettit v. Consolidated Rail Corp.*, 765 F. Supp. 508 (N.D. Ind. 1991).

60. *Western Sec. Co. v. Derwinski*, 937 F.2d 1276, 1279 (7th Cir. 1991).

61. *M.D.C. Wallcoverings v. State Bank of Woodstock*, 771 F. Supp. 242 (N.D. Ill. 1991).

62. *Roberson*, 770 F. Supp. at 1330-31.

63. *M.D.C. Wallcoverings*, 771 F. Supp. at 244.

64. *Navarro v. LTV Steel Co.*, 750 F. Supp. 930 (N.D. Ill. 1991).

9. Except for civil rights cases, orders remanding a case that was improperly removed are not ordinarily appealable.⁶⁵

II. SERVICE OF PROCESS

Perhaps the biggest news in the area of service of process is that the proposed amendments to Rule 4, which made it through the Judicial Conference and were passed on to the Supreme Court for consideration, were *not* adopted. The proposed changes to Rule 4 would have reorganized the Rule almost completely, permitted nationwide service of process in federal-question cases, and implemented a cost- and time-saving procedure whereby the formality of service could be waived by a defendant.⁶⁶ Although many other proposed rules were approved by the Supreme Court and enacted by default by Congress on December 1, 1991, the Supreme Court did not transmit the proposed amendments to Rule 4 "pending further consideration by the Court."⁶⁷ Otherwise, the service of process arena was relatively quiet during the survey period, with the following decisions merely highlighted:

1. Dismissal for failure to properly serve a defendant within 120 days was affirmed under Rule 4(j) where the plaintiff could show no good cause for his delays or deficiencies in service.⁶⁸
2. A *pro se* litigant showed good cause under Rule 4(j) when he relied on erroneous advice of the clerk's office.⁶⁹
3. A default judgment was reversed where service on the defendant was technically improper; actual knowledge of the lawsuit does not confer jurisdiction, nor do a plaintiff's efforts in diligently trying to serve a defendant.⁷⁰
4. The defense of insufficient service of process can be waived by failing to assert it by motion or in first responsive pleading or by leading a plaintiff to believe that service was adequate, by for instance, testifying regarding the default judgment without raising the propriety of service.⁷¹

65. *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223 (7th Cir. 1991).

66. See Proposed Amendments to the Federal Rules of Civil Procedure, Committee on the Rules of Practice and Procedure, Report of the Judicial Conference (June 19, 1990) [hereinafter 1990 Report] (on file with author).

67. Letter from Chief Justice William H. Rehnquist to Speaker of the House Thomas S. Foley, Accompanying Transmittal of Amendments to the Federal Rules of Civil Procedure (April 30, 1991).

68. *Williams v. Leach*, 938 F.2d 769 (7th Cir. 1991).

69. *Poulakis v. Amtrak*, 139 F.R.D. 107 (N. D. Ill. 1991) (following Judge McKinney's decision in *Patterson v. Brady*, 131 F.R.D. 679 (S.D. Ind. 1990)).

70. *Mid-Continent Wood Prods., Inc. v. Harris*, 936 F.2d 297 (7th Cir. 1991).

71. *Trustees of Cent. Laborers' Welfare Fund v. Lowery*, 924 F.2d 731 (7th Cir. 1991).

III. RULE 9(b) — PLEADING WITH PARTICULARITY

Rule 9(b)'s requirement that all averments of fraud be "stated with particularity" was addressed by Chief Judge Moran of the Northern District of Illinois in *In re First Chicago Corp. Securities Litigation*,⁷² in which it was held that a securities fraud complaint cannot simply quote verbatim from annual reports and press releases and assert that the statements are untrue.⁷³ Rather, the complaint must explain "what is untrue about each of the challenged statements."⁷⁴

Similarly, in *Fairmont Homes, Inc. v. Shred Pax Corp.*,⁷⁵ Judge Miller explained that although Indiana's Trial Rule 9(b) has been interpreted to require averments of the time, place, and substance of the false representations, the facts misrepresented, and the identification of what was procured by fraud, the federal courts interpret Federal Rule 9(b) more stringently.⁷⁶ In federal court, a plaintiff must also "identify particular statements and actions and specify why they are fraudulent."⁷⁷ Further, in federal court, the allegations of fraud cannot be based on information and belief except as to matters within the opposing party's control and even then, must be accompanied by a statement of facts upon which that belief is founded.⁷⁸ Judge Miller further held that the federal version applies even when the action is originally filed in state court and removed by the defendant to federal court.⁷⁹ Thus, plaintiffs averring fraud in a federal action *or* in a state case that has any potential of being removed to federal court must go the extra mile to comply with the strict requirements of the federal interpretation of Rule 9(b).

IV. PROPER PARTIES

Rule 19 basically provides that a party who is subject to service of process and whose presence will not destroy subject matter jurisdiction shall be joined if complete relief cannot be accorded without that party, or alternatively, if that party claims an interest in the litigation.⁸⁰ Such parties are often called "indispensable" parties. Rule 12(b)(7) backs up Rule 19 by allowing dismissal for failure to join a party under Rule

72. 769 F. Supp. 1444 (N.D. Ill. 1991).

73. *Id.* at 1452.

74. *Id.* at 1453 (quoting *Loan v. Federal Deposit Ins. Corp.*, 717 F. Supp. 964, 967 (D. Mass. 1989)).

75. 754 F. Supp. 665 (N.D. Ind. 1990).

76. *Id.* at 667-68.

77. *Id.* at 667.

78. *Id.*

79. *Id.*

80. FED. R. CIV. P. 19(a).

19.⁸¹ In *Todd v. Merrell Dow Pharmaceuticals*,⁸² the Seventh Circuit rejected an argument that joint tortfeasors are indispensable parties. In so doing the court noted the Supreme Court's statement in 1990 that "[i]t has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit."⁸³ This rule has significance in the diversity jurisdiction setting as well, for a plaintiff can obviously preserve diversity by naming only diverse defendants.

V. RULE 15 — AMENDMENT OF PLEADINGS

Rule 15(a) and (b) allows for amendments to be made to pleadings in various circumstances.⁸⁴ Rule 15(c) then speaks to amendments made after the statute of limitations has run and whether such amendments relate back to the original pleading so as to be deemed timely. Rule 15(c) was rewritten in 1991 in an effort to clarify and liberalize the standards. The Rule now reads in relevant part:

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.⁸⁵

Thus, three subsections to Rule 15(c), each separated by the disjunctive "or," provide an independent basis for relation back. Rule 15(c)(2) makes no substantive changes from former law, leaving intact the basic

81. FED. R. CIV. P. 12(b)(7).

82. 942 F.2d 1173 (7th Cir. 1991).

83. *Id.* at 1176 (quoting *Temple v. Synthes Corp.*, 111 S. Ct. 315 (1990) (per curiam)).

84. FED. R. CIV. P. 15(a), (b).

85. FED. R. CIV. P. 15(c).

standard for relation back of arising out of the same "conduct, transaction, or occurrence." The other two subsections, however, alter prior law.

First, Rule 15(c)(1), by providing that relation back occurs if it is permitted by the law providing the applicable statute of limitations, is meant to ensure that if an applicable state limitations period provides a more liberal standard for relation back, that standard should apply. The decision in *Schiavone v. Fortune*,⁸⁶ could have been interpreted otherwise, and this subsection is intended to make it clear that such a strict interpretation is not warranted.⁸⁷

Second, Rule 15(c)(3) is intended to override directly *Schiavone's* holding by permitting an amendment to change or add the name of a party if that party received actual notice of the action within 120 days of filing *or*, within the same period of time, knew or should have known that but for a mistake, the action would have been against that party.⁸⁸ Of course, Rule 15(c)(3) incorporates 15(c)(2)'s "same conduct, transaction, or occurrence" standard as well.⁸⁹

Thus, new Rule 15(c) encompass a common-sense approach to the relation back of amended pleadings. The perceived harshness of *Schiavone* has been ameliorated, and the Rule has been subdivided into a logical, workable framework.

VI. DISCOVERY

Several significant amendments were made to the discovery rules, in particular, Rules 34, 35, and 45. Unlike Indiana's version of Rule 34 which allows production of documents from nonparties,⁹⁰ the federal version of Rule 34 has not allowed such production. Instead, a party seeking to obtain documents from a third party custodian often had to go through the formality of serving a subpoena duces tecum on the custodian for production of documents at a deposition and sometimes even had to go through with a cursory deposition if the third party or the opponent did not cooperate. By amending Rules 34 and 45, the Supreme Court and Congress significantly improved this aspect of discovery, bringing it in line with the goal of the Federal Rules to secure

86. 477 U.S. 21 (1986).

87. See FED. R. CIV. P. 15(c) committee notes; 1990 Report, *supra* note 66.

88. See *supra* note 87.

89. As initially drafted, Rule 15(c) referred to Rule 4(m). Had Rule 4 been rewritten as proposed with the set of rules changes, Rule 4(j) would have been relocated at Rule 4(m). However, as part of a technical correction bill signed by the President on Dec. 9, 1991, Congress corrected the reference from 4(m) to 4(j). Pub. L. No. 102-198, 105 Stat. 931, 1623-27 (1991).

90. IND. R. TR. PROC. 34.

the just, speedy, and inexpensive determination of every action.⁹¹

Rule 35, speaking to physical and mental examinations, formerly allowed for examinations only by physicians or psychologists. The Rule was broadened by an amendment to allow examinations by a "suitably licensed or certified examiner."⁹² According to the drafters, the revision is intended to "include other certified or licensed professionals, such as dentists or occupational therapists, who are not physicians or clinical psychologists, but who may be well-qualified to give valuable testimony about the physical or mental condition that is the subject of the dispute."⁹³ In addition, by adding the requirement that the examiner be "suitably" licensed or certified, the drafters intended to allow the court to assess the credentials of the examiner and assure that the examiner is competent.⁹⁴

Although not specifically limited to discovery, Rule 72, which provides for a ten-day appeal period from a magistrate's ruling on non-dispositive matters, often arises in the discovery context. In the past, there was ambiguity over when the ten days begin to run. Indeed, the former rule provided that the district judge shall consider objections, "provided they are served and filed within 10 days after entry of the order," but later stated that objections are to be made within ten days of *service* of the order.⁹⁵ The Rule was amended to resolve this ambiguity and fortunately, to adopt the "ten days from service" standard.⁹⁶ The Rule also makes it clear that if timely objection is not made to the district judge, any claimed error is waived. Thus, practitioners must carefully consider whether to object to a magistrate's order, keeping in mind, however, that the standard of review is whether the order is clearly erroneous or contrary to law.⁹⁷

Finally, several important discovery decisions were issued from district courts in Indiana. In *Spangler v. Sears, Roebuck & Co.*,⁹⁸ Judge Tinder held that a party may take trial depositions after the close of discovery.⁹⁹ An order closing discovery thus does not prevent a party from memorializing a witness's testimony in order to offer it at trial. This makes

91. FED. R. CIV. P. 1.

92. FED. R. CIV. P. 35.

93. See FED. R. CIV. P. 35 committee notes; 1990 Report, *supra* note 66.

94. See *supra* note 93.

95. FED. R. CIV. P. 72(a).

96. *Id.* ("Within 10 days after being served with a copy of the magistrate's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate's order to which objection was not timely made.").

97. *Id.*

98. 138 F.R.D. 122 (S.D. Ind. 1991).

99. *Id.* at 123-26.

sense, for if the witness will be unavailable for trial (or if the parties agree to use a deposition in lieu of live testimony), the "trial" or "evidence" deposition will, by definition, not involve discovery of that witness. Instead, the trial deposition will be the time when evidence for trial is elicited, and the parties will adjust their "deposition" styles to more of a trial format accordingly.

In *Wauchop v. Domino's Pizza, Inc.*,¹⁰⁰ plaintiffs brought a personal injury action charging Domino's with negligence. The case was based in part upon Domino's thirty-minute delivery guarantee. Plaintiffs sought to discover a broad array of information relating to the thirty-minute guarantee, and Domino's responded with a motion for a protective order under Rule 26(c). Judge Miller denied the protective order, reasoning that while such orders are appropriate under Rule 26(c)'s "good cause" standard when trade secrets are involved, Domino's had not established that its policies on this subject constituted trade secrets or that disseminating the information would affect the court's ability to impanel an impartial jury or otherwise specifically embarrass Domino's.¹⁰¹ Judge Miller's decision contains an excellent discussion of these issues, including references to case law on the subject from across the nation. His decision also signals that the standard protective order that has generally been readily obtainable in this circuit is no longer automatic.

VII. SUMMARY JUDGMENT

Last year it was noted that the failure to follow a district court's local rules on summary judgment can result in a summary grant or denial of the motion, particularly in the Northern District of Illinois.¹⁰² During 1991, the courts continued to rely on such local rules to dispose quickly of summary judgment motions.¹⁰³ The district judges in Indiana have begun to take note of their local rules on summary judgment, and practitioners must ensure that summary judgment materials comply with them.

100. 138 F.R.D. 539 (N.D. Ind. 1991).

101. *Id.* at 546.

102. Maley, *1990 Developments*, *supra* note 4, at 664.

103. *E.g.*, *Maksym v. Loesch*, 937 F.2d 1237, 1240-41 (7th Cir. 1991) (Judge Posner deems facts asserted in the movant's papers to be admitted, writing, "We have approved strict enforcement of [Local] Rule 12(m) [of the Northern District of Illinois] repeatedly."); *Appley v. West*, 929 F.2d 1176, 1179-80 (7th Cir. 1991) (*per curiam*); *Colby v. J.C. Penney Co.*, 926 F.2d 645, 647 (7th Cir. 1991) (Judge Cummings notes effect of failure to follow local rules on summary judgment); *Property Owners Ins. Co. v. Cope*, 772 F. Supp. 1096, 1098 (N.D. Ind. 1991) (Judge Moody notes Local Rule 11); *Terre Haute Indus., Inc. v. Pawlik*, 765 F. Supp. 925, 928-29 (N.D. Ill. 1991) (party failed to comply with local summary judgment rule).

VIII. TRIAL

A number of developments occurred affecting federal trial practice. First, Rules 41, 47, 48, 50, and 52 were amended. Rules 47 and 48 deal with jurors. The former version of Rule 47 allowed alternate jurors.¹⁰⁴ New Rule 47 eliminates this option,¹⁰⁵ recognizing that the "use of alternate jurors has been a source of dissatisfaction with the jury system because of the burden it places on alternates who are required to listen to the evidence but denied the satisfaction of participating in its evaluation."¹⁰⁶

Rule 48 formerly allowed any number of jurors,¹⁰⁷ but new Rule 48 provides that the jury must initially consist of not less than six and not more than twelve jurors.¹⁰⁸ New Rule 48 further adds that each juror shall participate in the verdict unless excused for good cause (illness, etc.) during trial or deliberations. Rule 48 also provides that unless the parties stipulate otherwise, the verdict shall be unanimous, and no verdict shall be taken from a jury of fewer than six members. Thus, depending on the length of trial, practitioners can expect juries of seven, eight, or nine members in civil cases, with each juror voting on the verdict.

Rules 41, 50, and 52 were amended to effect a housekeeping change in the names used for concluding bench and jury trials. Rule 41(b) formerly provided for bench trials to be dismissed as a matter of law when the plaintiff fails to carry its burden of proof.¹⁰⁹ This provision is simply deleted from the amended Rule 41(b), and the same substantive provision is inserted in new Rule 52(c).¹¹⁰ In bench trials, parties will thus no longer make motions for involuntary dismissal under Rule 41(b), but will instead make motions for "judgment on partial findings" under Rule 52(c). As under former Rule 41(b), the courts retain discretion to enter no judgment until the close of all the evidence, and factual findings made pursuant to a Rule 52(c) judgment are reviewed under the "clearly erroneous" standard.¹¹¹

Finally, Rule 50, dealing with jury trials, was rewritten to do away with the directed verdict and judgment notwithstanding the verdict (j.n.o.v.) labels. Amended Rule 50 instead uses a single, common-sense label for these rulings, which will now be called "judgments as a matter of law."¹¹² New Rule 50 does the following:

104. FED. R. CIV. P. 47.

105. *Id.*

106. *See id.* 47 committee notes; 1990 Report, *supra* note 66.

107. FED. R. CIV. P. 48.

108. *Id.*

109. FED. R. CIV. P. 41(b).

110. FED. R. CIV. P. 52(c).

111. *See id.* committee notes; 1990 Report, *supra* note 66.

112. FED. R. CIV. P. 50.

1. A party may move for judgment as a matter of law (formerly the directed verdict motion) on any claim or issue during trial, and the court may grant the motion if under controlling law the nonmovant cannot obtain a favorable ruling.¹¹³
2. A motion for judgment as a matter of law must be made during trial if a party desires to renew the same motion (formerly the j.n.o.v. motion) after an adverse jury verdict.¹¹⁴
3. The renewed motion for judgment as a matter of law (formerly the j.n.o.v. motion) must be made not later than ten days after entry of judgment.¹¹⁵
4. A motion for a new trial or alternative motion for a new trial may be joined with the renewed motion for judgment as a matter of law.¹¹⁶
5. The standard for determining a motion for judgment as a matter of law or a renewed motion for judgment as a matter of law is the same as under prior practice for directed verdicts or j.n.o.v.s. Specifically, as the name suggests, judgment is proper if, as a matter of law, the nonmovant cannot prevail on the issue or claim in question. This is the same standard invoked at summary judgment pursuant to Rule 56 wherein the court construes the evidence favorably to the nonmovant and determines, as a matter of law, whether any rational jury could find for the nonmovant on the issue.¹¹⁷

Thus, the amendments to Rule 50 reflect a common-sense effort to invoke standard terminology throughout the Federal Rules. New Rule 50 also implicitly confirms that the standard for Rule 56 and Rule 50 is the same. Finally, new Rule 50 confirms that an initial motion for

113. FED. R. CIV. P. 50(a)(1).

114. FED. R. CIV. P. 50(b). This was true in the Seventh Circuit with directed verdict motions, a requirement for a later j.n.o.v. motion, but was not specifically required by the text of former Rule 50 nor universally adopted by all circuits. See *Continental Airlines, Inc. v. Wagner-Morehouse, Inc.*, 401 F.2d 23, 27 (7th Cir. 1968) (requiring motion for directed verdict as prerequisite to seeking j.n.o.v.); *Amendments to Federal Rules Are Approved By Supreme Court*, 59 U.S.L.W. 2695, 2696 (May 21, 1991) ("The practice followed in some courts of allowing a motion for judgment notwithstanding the verdict to be made even though not preceded by a motion for directed verdict is thus clearly prohibited.").

115. FED. R. CIV. P. 50(b).

116. *Id.*

117. See *id.* committee note (discussing implicit standard and noting that because this standard "is also used as a reference point for entry of summary judgment under Rule 56(a), it serves the link the two related provisions"); John R. Maley, *Developments in Federal Civil Practice Affecting Indiana Practitioners*, 22 IND. L. REV. 103 (1989) (analyzing the modern view of summary judgment).

judgment as a matter of law at trial is a prerequisite for a later renewed motion for judgment as a matter of law after judgment is entered.

Several significant decisions dealing with trial issues were issued during 1991. In *Oostendorp v. Khanna*,¹¹⁸ the Seventh Circuit approved of Judge Shabaz's practice of prohibiting reading of more than five pages from depositions at trial and requiring five page narrative summaries of each deposition used at trial. Although the Seventh Circuit acknowledged that it "might question the validity of an overly rigid application of the district court's requirement" and noted that the five-page limit should be increased in "appropriate cases," it held that the use of depositions at trial pursuant to Rule 32 is discretionary with the district court.¹¹⁹ Further, the Seventh Circuit held that neither the Due Process Clause nor the Seventh Amendment requires courts to admit deposition testimony.¹²⁰

The *Oostendorp* decision should not be taken lightly, for there appears to be a move towards requiring deposition summaries throughout the Seventh Circuit. Judge Lee of the Northern District of Indiana has made this standard practice in many cases, and Judge Dillin of the Southern District of Indiana has reportedly imposed similar limitations on occasion as well. Although it no doubt results in speedier trials, it is uncertain whether this practice actually promotes justice. The practice might end up costing clients more in attorney time spent attempting to summarize depositions in a manner that is effective for trial. For plaintiffs' counsel working on a contingency basis, this could result in undue, unpaid busy work that does not enhance the client's case. It is also difficult to imagine how a five hour deposition of a crucial out-of-state examining physician can be adequately summarized in several pages to include key points elicited during cross-examination.¹²¹

Practitioners should seek to determine at the onset of litigation whether the assigned judge might follow such a practice. If so, trial

118. 937 F.2d 1177 (7th Cir. 1991).

119. *Id.* at 1179.

120. *Id.* at 1180.

121. Many of the current so-called civil justice "reforms" could well be nothing more than mechanisms for shifting work from the courts to litigants. This is a prime example, for it would seem to take less total time (court + parties) to have a three-hour deposition read into evidence, boring though it may be, than having the parties spend several hours each to reduce the three-hour deposition to five pages. Further, it is unclear whether such a device would actually save courts time over the long run, for there will no doubt be disagreements over the characterizations of deposition summaries and admissibility of testimony that could require court attention. There is no question that the federal courts are busy, but if the problem is too many cases chasing too few judges, magistrates, and law clerks, then it must be questioned whether further efforts to enlarge the resources of the federal courts are necessary.

strategy could be affected accordingly, for instance, by ensuring the selected witnesses are, to the extent possible, presented by live testimony rather than deposition. Further, practitioners would seem to be able to enhance the chances of having a deposition used at trial by videotaping the deposition, which is always preferable to a rote reading of a deposition.

The use of video depositions is common in most federal courts. Indeed, the taking of video depositions is implicitly authorized by Rule 30(b)(4), which allows the parties to stipulate or the court to order that the deposition be recorded other than by stenographic means.¹²² The Seventh Circuit recently explicitly approved of video depositions, noting that “[v]ideotaped depositions are a necessary and time effective method of preserving witnesses’ time and allocating precious court and judicial time in this age of advanced court technology and over-crowded court calendars.”¹²³ Moreover, a video deposition need not be expensive, for there is no reason why, with a little preparation, counsel cannot set up the video and audio equipment and make a perfectly adequate recording.¹²⁴

Counsel can also enhance the prospects of having the deposition rather than a summary used at trial by keeping trial depositions reasonable in length. The point of the deposition-summary orders is obviously that judges believe most witnesses’ testimony can be reduced to a few pages. There is merit to this belief, and certainly most witnesses’ testimony could be handled in a one-hour deposition as effectively as in a five hour deposition. The former would seem to have a good chance of being used at trial; the latter not. Thus, the lesson from the *Oostendorf* decision would seem to be that fans of the full day (and longer) deposition will not be rewarded for their efforts and should reconsider their styles, at least in most situations. This is probably not so bad after all.

Several other decisions of interest dealing with trial issues were rendered during the survey period. These are merely highlighted below:

122. FED. R. CIV. P. 30(b)(4). See also *Commercial Credit Equip. Corp. v. Stamps*, 920 F.2d 1361, 1368 (7th Cir. 1990) (Rule 30(b)(4) allows the parties to stipulate to recording a deposition by “other than stenographic means,” and videotaped depositions qualify as “other than stenographic means”).

123. *Commercial Credit*, 920 F.2d at 1368.

124. Unless costs are a real problem, it is of course still wise to have a court reporter present to take testimony and prepare transcripts. This author has used this joint system on several occasions and found it satisfactory. Assuming your law firm has the equipment (video camera, microphones, tripod, two VCRs for copying, and a monitor), all of which can be obtained for less than \$2,000, there is no additional cost in videotaping a deposition. Moreover, there is something about a video camera that seems, beyond the oath and presence of the court reporter, to give witnesses additional pause in departing from the truth. Finally, there are the obvious benefits at trial of playing a witness’s testimony on television rather than merely reading pages and pages of a deposition.

1. The *Batson*¹²⁵ rule that prohibits the use of peremptory challenges on the basis of race applies equally in civil cases as in criminal cases.¹²⁶
2. *Batson* was not violated when the government used peremptory challenges to excuse two Italian-American surnamed jurors because the Italian defendant did not make a prima facie showing that the veniremen belonged to a particular ethnic group or that the purported ethnic group (Italian-Americans) comprises a cognizable ethnic group subject to discrimination.¹²⁷
3. A litigant may object to the discriminatory use of peremptory challenges under *Batson* even though the litigant is not of the same race as the member of the venire. Thus, a white plaintiff has standing to assert error in the discriminatory exclusion of a black individual from the jury.¹²⁸

125. *Batson v. Kentucky*, 476 U.S. 79 (1986).

126. *Dunham v. Frank's Nursery & Crafts, Inc.*, 919 F.2d 1281 (7th Cir. 1990). The Supreme Court agreed with the Seventh Circuit's view several months later in *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991). The *Batson* rule and its application were aptly summarized by Judge Kanne in *Dunham* as follows:

In order to establish a prima facie case under *Batson*, the defendant must first show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to prevent members of his race from serving on the jury. Second, the defendant is entitled to rely on the fact that the mere exercise of a peremptory challenge can be used as circumstantial evidence of discriminatory intent. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used peremptories to exclude veniremen from the petit jury on account of their race.

Once the defendant makes a prima facie showing, the burden shifts to the state to come forward with a non-racial explanation for its challenge. Although the prosecutor's explanation does not have to rise to the level of cause, the mere denial of a discriminatory motive, or an affirmation of prosecutorial good faith does not suffice as a neutral explanation. After hearing the state's explanation, the trial court must determine if the defendant has established purposeful discrimination.

Dunham, 919 F.2d at 1283 (citations omitted). The first element, that the objecting party be a member of the cognizable group, was altered by the Supreme Court in *Edmonson*. *Edmondson*, 111 S. Ct. at 2088 (to bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service, thus race is irrelevant to a defendant's standing to object to the "discriminatory use of peremptory challenges").

127. *United States v. Campione*, 942 F.2d 429, 432-33 (7th Cir. 1991). Judge Kanne thus did not reach the larger issue of whether *Batson* extends to discrimination in jury selection based on ethnicity.

128. *Soler v. McHenry*, 771 F. Supp. 252, 254 (N.D. Ill. 1991).

4. A civil litigant satisfied his burden of showing a race-neutral reason for excluding a prospective black juror where the litigant explained that the prospective juror was a cardiology technologist. This satisfied the *Batson* requirement that the explanation be clear and reasonably specific without having to rise to the level of cause because the case involved claims that the plaintiff's heart condition had been aggravated by the defendant's conduct.¹²⁹
5. The Seventh Circuit affirmed Judge McKinney's ruling barring purported rebuttal witnesses from testifying at trial, reasoning in part that the evidence could have been offered (and even was, in one respect) during the plaintiff's case-in-chief; the exclusion of rebuttal evidence that could have been offered during a party's case-in-chief is reversible only for an abuse of discretion.¹³⁰

IX. RULE 58 JUDGMENTS, POST-JUDGMENT MOTIONS, AND APPEALS

Rule 58 mandates that "[e]very judgment shall be set forth on a separate document."¹³¹ The goal of this maxim is to make it easy for the parties and others who might have an interest in knowing precisely what the judgment is and when it was entered. If litigants do not comply with Rule 58, their appellate rights (particularly the right to appeal that arises with finality) can be seriously affected. Two decisions from the Seventh Circuit during the survey period addressed the question of whether a "minute order" can constitute the "separate document" judgment required by Rule 58, though with slightly different methods.

In *Alpine State Bank v. Ohio Casualty Insurance Co.*,¹³² the district court granted a summary judgment motion in a declaratory judgment action, issued a minute order, and issued a form prescribed for judgment in a civil case. None of the three documents, however, actually declared the rights of the parties. Appeal was taken, and the Seventh Circuit raised the issue of appellate jurisdiction *sua sponte* over concern about whether Rule 58 was satisfied. Judge Ripple explained that neither the memorandum opinion nor the minute order can satisfy the separate-document judgment rule. Instead, the judgment "must be self-contained and complete" and must "describe the relief to which the prevailing

129. *Id.*

130. *Cook v. Navistar Int'l Transp. Corp.*, 940 F.2d 207, 214 n.5 (7th Cir. 1991).

131. *FED. R. CIV. P.* 58.

132. 941 F.2d 554 (7th Cir. 1991).

party is entitled and not simply record that a motion has been granted.”¹³³

Judge Ripple added, “[W]e shall not hesitate to hold that we lack jurisdiction if the judgment ambiguously declares the rights of the parties or is unclear or calls into serious question the matter of finality.”¹³⁴ Despite these strict pronouncements, the Seventh Circuit assumed jurisdiction because “consideration must be given to practicalities,” and from a practical standpoint, there was no question that the district court intended a final judgment because it clearly determined the parties’ rights in the memorandum opinion, denied a motion to vacate the order, and indicated that it considered the case closed.¹³⁵

Similarly, in *American National Bank & Trust Co. v. Secretary*,¹³⁶ after reciting the litany of Seventh Circuit decisions requiring strict compliance with Rule 58, Judge Kanne concluded that the minute order form completed by the court clerk satisfied the separate document requirement.¹³⁷ Judge Kanne so held because the minute order set forth the relief to which the plaintiff was entitled, because it did not incorporate the court’s thirteen pages of reasoning, and because the box on the minute order indicating “Judgment is entered as follows” was marked.¹³⁸ He noted, however, that the exercise to determine whether Rule 58 had been complied with could have been avoided had the clerk simply followed proper procedure and entered Judgment Form AO 450.¹³⁹

For practitioners, and particularly those who might want to appeal, this subject poses several problems. Pursuant to Rules 58 and 79, it is the clerk, not the district judge, who enters judgments.¹⁴⁰ Moreover, Rule 58 states that forms of judgment are *not* to be submitted except upon direction of the court, and such directions shall not be given as a matter of course.¹⁴¹ The clerk, of course, is not required to be and often is not a lawyer, nor are the clerk’s many deputy clerks who usually handle these tasks. In the routine two party, one issue case this ordinarily causes no problem. The days of dockets with only such “routine” cases, however, are obviously long since past. Thus, in the first instance, the rules as presently configured leave an aggrieved party’s right to appeal in the hands of nonlawyer deputy clerks who do not receive training

133. *Id.* at 558-59 (quoting *American Int’l Ins. Exch. v. Occidental Fire & Cas. Co.*, 835 F.2d 157, 159 (7th Cir. 1987)).

134. *Id.* at 559.

135. *Id.*

136. 946 F.2d 1286 (7th Cir. 1991).

137. *Id.* at 1289.

138. *Id.*

139. *Id.* at 1289 n.4.

140. *See* FED. R. CIV. P. 58, 79(a).

141. FED. R. CIV. P. 58.

in the many intricacies of final judgments and appellate jurisdiction.

The real burden of scrutinizing entry of judgment thus falls upon counsel, where it probably belongs anyway. The lesson of the two Seventh Circuit decisions discussed above is that counsel must be careful to ensure that a proper Rule 58 separate document final judgment is entered. If a purported judgment appears improper or not in compliance with Rule 58, counsel should act immediately and in no event later than ten days after entry of the purported judgment. Indeed, a Rule 59 motion to alter or amend can only be filed within ten days of the entry of judgment, and *no* extension of the ten day time period is permissible.¹⁴²

Finally, in the appellate practice arena, related amendments were made to Rule 77(d) dealing with notice of judgments and Rule 4(a)(6) of the Federal Rules of Appellate Procedure. Under prior law, if the clerk recorded the mailing of a judgment, but the parties did not receive notice of the entry of judgment, that did not excuse the failure to file a timely notice of appeal.¹⁴³ Rule 77(d) and Appellate Rule 4 now allow a party not receiving such notice to try to establish this fact to the district court's satisfaction and, if also able to show no "prejudice" to any other party, to move to reopen the time for appeal. The motion to reopen the appeal time must be filed within the earlier of seven days after receipt of notice of the judgment or 180 days after entry of the judgment.¹⁴⁴ The term prejudice is not defined in Appellate Rule 4(a)(6), but the legislative history indicates that this means more than just the cost of having to oppose the appeal; it means some "adverse consequence" such as when the "appellee [has] taken some action in reliance on the expiration of the normal time period for filing a notice of appeal."¹⁴⁵

Thus, the harshness of former practice is ameliorated, but with only a limited window of opportunity for appellants who do not receive notice. The absolute 180-day ceiling confirms that litigants must continue to monitor the docket, and if an adverse judgment is possible (i.e., if a dispositive motion is pending), should do so with regularity. On the other hand, for those who prevail in district court, Rule 77(d) provides a mechanism for ensuring that the appeal clock will begin running. Specifically, Rule 77(d) allows any party to serve a notice of the entry of judgment, and the drafters encourage winning parties to utilize this procedure to ensure that the normal time periods for appeal remain

142. FED. R. CIV. P. 6(b), 59; *Winston Network, Inc. v. Indiana Harbor Belt R.R. Co.*, 944 F.2d 1351, 1362 (7th Cir. 1991); *Varhol v. Nat'l R.R. Passenger Corp.*, 909 F.2d 1557 (7th Cir. 1990) (en banc).

143. *E.g.*, *Spika v. Village of Lombard*, 763 F.2d 282 (7th Cir. 1985).

144. FED. R. APP. P. 4(a)(6).

145. *See id.* committee notes; 1990 Report, *supra* note 66.

intact.¹⁴⁶ Thus, prevailing parties are well advised to immediately serve opposing counsel with notice and copies of adverse judgments and would be wise to do so by, at the minimum, certified mail with return receipt requested so that there can be no dispute about receipt of notice.

X. COSTS

Pursuant to Rule 54(d), "costs shall be allowed as of course to the prevailing party unless the court otherwise directs."¹⁴⁷ The courts addressed costs issues in several decisions which are highlighted below:

1. The costs¹⁴⁸ of enlarging trial exhibits such as a police "mug shot" are recoverable.
2. In resolving an issue not directly addressed by any circuit courts, the Seventh Circuit held that when a deposition is videotaped and transcribed, it is "proper to tax costs for the videotaping of depositions, but not necessarily for the transcripts thereof."¹⁴⁹
3. Rule 54(d) creates a presumption that the prevailing party will recover costs, and it is the losing party's burden to show affirmatively that the prevailing party is not entitled to costs.¹⁵⁰
4. The underlying documents generated from deposition or copying expenses need not be introduced at trial to recover the expenses as costs — they need only be reasonably necessary.¹⁵¹

Recoverable costs can be significant, often involving tens of thousands of dollars. Prevailing parties should thus give careful attention to recovering costs after the merits have been decided.

146. See FED. R. CIV. P. 77(d), 4(a)(6) committee notes; 1990 Report, *supra* note 66.

147. FED. R. CIV. P. 54(d).

148. 28 U.S.C. § 1920 provides that the court may tax:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920 (1988).

149. *Commercial Credit Equip. Corp. v. Stamps*, 920 F.2d 1361, 1368 (7th Cir. 1990).

150. *M.T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1409 (7th Cir. 1991).

151. *Id.* at 1410.

XI. SANCTIONS

Sanctions continue to generate collateral litigation for advocates and the courts. The basic Rule 11 standards in the Seventh Circuit are outlined in a previous survey article, and practitioners are referred to that article for a review of the fundamentals.¹⁵² The following summary highlights key decisions during the survey period:

1. In *Business Guides, Inc. v. Chromatic Communications Enterprises*,¹⁵³ the Supreme Court held that Rule 11 applies to any party who signs a pleading, motion, or other court paper, regardless of whether that party was represented by counsel.¹⁵⁴ Thus, when, for example, corporate officials sign an affidavit, they can be subjected to Rule 11 sanctions.
2. The *Business Guides* Court further held that such parties, whether represented by counsel or not, are held to the same standard of reasonableness under the circumstances as applies to attorneys, although the legal inquiry that is expected from a party may vary from "case to case," and "what is objectively reasonable for a client may differ from what is objectively reasonable for an attorney."¹⁵⁵
3. In *Chambers v. NASCO, Inc.*,¹⁵⁶ the Supreme Court held that the federal courts have the inherent power to impose attorney's fees and related expenses on a party as a sanction, even aside from the authority granted by Rule 11 and 28 U.S.C. § 1987.¹⁵⁷
4. A ruling from Judge McKinney imposing sanctions on debtor's counsel for filing a frivolous brief was affirmed.¹⁵⁸ The brief was objectively frivolous because of its numerous errors and an unfounded legal argument. The brief was "far below the standards of practice reasonably expected in this or any other court," thus causing the district court "to spend additional time to insure that a proper decision is reached."¹⁵⁹
5. Rule 11 sanctions cannot be imposed for a frivolous state court complaint that is removed to federal court.¹⁶⁰

152. Maley, 1989 *Developments*, *supra* note 23, at 292-300.

153. 111 S. Ct. 922 (1991).

154. *Id.* at 933.

155. *Id.*

156. 111 S. Ct. 2123 (1991).

157. *Id.* at 2133.

158. *In re Roete*, 936 F.2d 963, 967 (7th Cir. 1991).

159. *Id.*

160. *Maciosek v. Blue Cross & Blue Shield*, 930 F.2d 536, 541 (7th Cir. 1991).

6. Sanctions were imposed and affirmed against counsel and his client for deliberate frustrations of discovery — the thrust of the misconduct occurred at the client's deposition where documents were not produced, frivolous objections were repeatedly made, and the witness was instructed not to answer questions that counsel deemed irrelevant, notwithstanding Rule 30(c)'s requirement that evidence objected to shall be taken subject to objection.¹⁶¹
7. In confirming that Rule 11 is not intended to thwart creative arguments, the Seventh Circuit *reversed* sanctions that had been imposed on civil rights counsel when a decision that *arguably* (but not conclusively) controlled was not cited.¹⁶²

XII. LOCAL RULES CHANGES AND CIVIL JUSTICE REFORM PLANS

As this Article went to press, two key developments occurred that significantly impact local federal civil practice. First, the Southern District of Indiana adopted revised local rules effective February 1, 1992.¹⁶³ The new rules are completely renumbered to match the corresponding Federal Rules. Otherwise, the new rules are substantially the same as the prior rules with a few key changes including:

- No motion need be filed for an enlargement of time to file responsive pleadings or discovery responses if opposing counsel does not object; a confirming letter is sent to opposing counsel and filed with the clerk.¹⁶⁴
- Briefs can be thirty-five pages in length, and leave to file over-sized briefs requires "extraordinary and compelling reasons." If leave is granted, the over-sized brief must contain a table of contents, statement of issues, and table of authorities.¹⁶⁵

Practitioners are well advised to study the new rules.

161. *Castillo v. St. Paul Fire & Marine Ins. Co.*, 938 F.2d 776, 778 (7th Cir. 1991). The *Castillo* decision should thus be in every practitioner's deposition notebook for use against the s.o.b. litigator — if providing a copy of the decision to such a practitioner and noting the relevant portions of the opinion on the record does not deter the misconduct, at least the record will be very strong for a sanctions motion.

162. *Thompson v. Duke*, 940 F.2d 192 (7th Cir. 1991). For practitioners opposing a sanctions motion, the *Thompson* opinion contains a wealth of favorable language, for instance, that "innovative arguments" are "especially important" and are not intended to be thwarted by Rule 11. *Id.* at 195.

163. S.D. IND. L.R. 1.1(b).

164. S.D. IND. L.R. 6.1.

165. S.D. IND. L.R. 7.1(b).

Second, both the Northern and Southern Districts adopted Civil Justice Expense and Reduction Delay Plans effective December 31, 1991.¹⁶⁶ Although a detailed analysis of each plan is beyond the scope of this Article, the highlights are as follows:

Southern District:

- Case management plans and scheduling orders should set summary judgment motions to be briefed as soon as reasonably feasible. In complex cases, summary judgment motions should be ripe no less than ninety days prior to trial. In other cases, sixty days prior to trial. If a summary judgment motion has not been resolved prior to thirty days before trial, the motion should be decided by the trial date and the trial should be rescheduled thirty to ninety days later.¹⁶⁷
- New local rules are recommended to hold trials within six to eighteen months after filing and to require the parties to meet informally and adopt a stipulated case management plan.¹⁶⁸

Northern District:

- The court declined to adopt a requirement that counsel submit a stipulated case management plan, but will consider such a requirement in appropriate cases and encouraged parties to do so voluntarily.¹⁶⁹
- Mandatory disclosure of basic information will be tried during 1992 on an experimental basis, with each division of the court formulating its own standard order mandating what must be disclosed.¹⁷⁰

These plans will have a dramatic impact on the way federal civil cases are litigated in Indiana.

XIII. MISCELLANEOUS

Finally, a number of developments occurred that are not easily pigeonholed into separate categories. For instance, Rule 45 dealing with

166. See Civil Justice Expense and Delay Plan for the United States District Court for the Southern District of Indiana (Dec. 31, 1991); Civil Justice Expense and Delay Plan for the United States District Court for the Northern District of Indiana (Dec. 31, 1991).

167. Civil Justice Expense and Delay Reduction Plan for the Southern District of Indiana 11 (Dec. 31, 1991).

168. *Id.* at 3-8.

169. Civil Justice Expense and Delay Reduction Plan for the Northern District of Indiana § 2.07 (Dec. 31, 1991).

170. *Id.* § 3.03.

subpoenas was completely rewritten and incorporates many common-sense changes that will save litigants time and money. It is strongly suggested that new Rule 45 be studied in its entirety given its radical reform. The key changes are outlined as follows:

1. The clerks shall issue signed subpoenas in blank, which can be completed and served by attorneys as officers of the court.¹⁷¹
2. Attorneys may issue subpoenas on behalf of a court in which the attorney is authorized to practice, *as well as other courts in which a deposition or production is compelled by the subpoena*, provided the deposition or production relates to an action pending in a court where the attorney is authorized to practice.¹⁷²
3. Rule 45(c) outlines new protections for persons subject to subpoenas, including the duty of parties or attorneys responsible for issuing subpoenas to take reasonable steps to avoid imposing undue burden or expense on a person subject to subpoena.¹⁷³
4. Persons commanded by subpoena to produce documents may serve written objections within fourteen days of service of the subpoena, and if objection is made, no inspection shall occur without court order.¹⁷⁴
5. New protections are added for disclosure of trade secrets and disclosure of an unretained expert's opinion or information.¹⁷⁵
6. Documents subject to a subpoena shall be produced as kept in the ordinary course of business or organized to correspond to the categories in the demand.¹⁷⁶
7. When information subject to a subpoena is withheld on a claim of privilege or work product, the objection shall be expressly stated and supported by a description of the documents sufficient to enable the demanding party to contest the claim.¹⁷⁷

171. FED. R. CIV. P. 45(a)(3)(B)(1).

172. FED. R. CIV. P. 45(a)(3). Thus, it will no longer be necessary to retain local counsel in foreign districts to get subpoenas issued.

173. FED. R. CIV. P. 45(c)(1).

174. FED. R. CIV. P. 45(c)(2)(B). This changes prior law which allowed objection within 10 days of service, and which resulted in confusion over how to count the 10 days. FED. R. CIV. P. 45(c)(2)(B) committee notes; 1990 Report, *supra* note 66.

175. FED. R. CIV. P. 45(c)(3)(B).

176. FED. R. CIV. P. 45(d)(1).

177. FED. R. CIV. P. 45(d)(2).

Rule 45 thus expands the ease of the use of subpoenas, but imposes corresponding duties and protections as well.

A number of other miscellaneous decisions or passages of interest to federal practitioners are noted below:

1. Ordinarily, substantive matters raised in footnotes rather than the text of briefs are disregarded by the Seventh Circuit and the Northern District of Illinois.¹⁷⁸
2. A litigant who fails to press a point by supporting it with pertinent authority or by showing why it has merit despite supporting authority forfeits the point; the court is not required to do the litigants' research.¹⁷⁹
3. Arguments raised for the first time in a reply brief are waived.¹⁸⁰
4. Lawyers' attempts "to impugn the integrity of the other party through unsupported allegations and innuendo irrelevant to the resolution of the issues" are frowned upon in the Seventh Circuit.¹⁸¹
5. Reliance on "facts" that are outside of the record is of no effect on the merits and raises the ire of the Seventh Circuit.¹⁸²
6. The President issued Executive Order 12778 commanding federal agencies and their counsel to give prefiling notice of civil complaints, arrange settlement conferences, use alternative dispute resolution, make efforts to streamline and expedite discovery, present only reliable expert testimony, seek sanctions against opposing counsel and parties when appropriate, employ efficient case-management techniques, and offer to enter into a two-way fee shifting agreement with opposing parties.¹⁸³
7. In *Salve Regina College v. Russell*,¹⁸⁴ the Supreme Court held that questions of state law are to be reviewed *de novo* by federal appellate courts, rather than under a deferential standard in which the local district judge is presumed better able to predict state law.¹⁸⁵

178. *Johnston v. Bumba*, 764 F. Supp. 1263, 1282 n.21 (N.D. Ill. 1991). Ironically, the decision containing this proposition contains more than 20 footnotes, and this proposition itself is found in a footnote.

179. *Heinz v. Frank Lloyd Wright Found.*, 762 F. Supp. 804, 807 (N.D. Ill. 1991).

180. *Williams v. Romano Bros. Beverage Co.*, 939 F.2d 505, 509 (7th Cir. 1991); *Simkunas v. Tardi*, 930 F.2d 1287, 1292 (7th Cir. 1991).

181. *Boyle v. Chicago Hous. Auth.*, 946 F.2d 54, 56 n.5 (7th Cir. 1991).

182. *Williams v. Leach*, 938 F.2d 769, 773 (7th Cir. 1991).

183. Exec. Order No. 12,778, 56 Fed. Reg. 55,195 (1991).

184. 111 S. Ct. 1217 (1991).

185. *Id.* at 1221.

Finally, in one of this author's favorite passages of the year, a *per curiam* panel including Judges Easterbrook and Posner held that a skeletal argument contained in a single unreasoned paragraph did not preserve a claim because, in the words of the panel, "Judges are not like pigs, hunting for truffles buried in briefs."¹⁸⁶ Like other passages that often emanate from these two scholarly judges, these words show that if nothing else, Seventh Circuit practitioners can continue to look forward to anything but rote opinions.

186. *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

Recent Developments in Indiana Appellate Procedure: Reforming the Procedural Path to the Indiana Supreme Court

GEORGE T. PATTON, JR.*

During 1991, the Indiana Supreme Court made significant changes to the rules of appellate procedure. Recent amendments provide a new procedure for appeals from the tax court to the supreme court.¹ They also allow a United States District Court sitting in the state to certify a question of Indiana law to the state supreme court.² Finally, the amendments clarify the time deadlines for filing the praecipe and record of proceedings in interlocutory appeals.³ All lawyers who practice before Indiana's appellate courts should be aware of these changes.

These changes reflect the Indiana Supreme Court's continuing interest in systematically reviewing the appellate process. From 1976 to 1988, over eighty-five percent of the high court's docket consisted of criminal appeals that came directly from the trial court by mandate of the state constitution.⁴ On November 8, 1988, the people of Indiana voted to amend the state constitution to allow the supreme court to create a more balanced docket of criminal and civil appeals.⁵ Within a week of the election, the Indiana Supreme Court exercised its constitutional authority to shift initial review of many criminal cases to the court of

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1. IND. APP. R. 18 (effective January 1, 1992).

2. IND. APP. R. 15(O) (effective July 2, 1991).

3. IND. APP. R. 2(A) (effective January 1, 1992); IND. APP. R. 3(B) (effective January 1, 1992).

4. IND. CONST. art. VII, § 4 (criminal conviction resulting in a sentence of 10 years or more could be directly appealed to the supreme court without review by the court of appeals). Chief Justice Shepard discussed the increase in direct appeals in numerous speeches and articles. See, e.g., Chief Justice Randall T. Shepard, *Changing the Constitutional Jurisdiction of the Indiana Supreme Court: Letting a Court of Last Resort Act Like One*, 63 IND. L.J. 669, 682 n.75 (1988) [hereinafter Shepard, *Changing*]; Hon. Randall T. Shepard, *Vote 'Yes' on Proposition 2*, 32 RES GESTAE 56 (1988).

5. IND. CONST. art. VII, § 4 (appellate review of criminal cases with sentences of 50 years or less could initially be performed by the court of appeals).

appeals, the state's intermediate appellate court.⁶ In the past three years, civil transfer opinions increased from ten percent of the supreme court's docket to twenty-five percent.⁷

The shift from mandatory criminal appeals to a balance of criminal and civil appeals has focused the Indiana Supreme Court's attention on the process it uses to decide which cases to review. At the beginning of 1991, Chief Justice Randall T. Shepard stated that the state's court of last resort "must develop more refined ways of selecting cases to decide on the merits."⁸ The 1991 amendments represent a beginning; additional refinements in 1992 are likely. One of Chief Justice Shepard's expectations for 1992 is for more change in appellate procedures:

The way (the Indiana Supreme Court) decides which cases to take on the merits, the way in which we decide opinions, those methods are largely unchanged from the era in which we were mostly a criminal . . . court. We need to reorganize internally our own processes. It may be that the reorganization will show up in ways that affect appellate practice in the state.⁹

The supreme court's 1991 amendments to the appellate rules provide a glimpse of possible changes in the coming years.

The first section of this Article summarizes developments in the Indiana Rules of Appellate Procedure that occurred during 1991. Part II discusses the historical origins of the process of transfer from the court of appeals to the supreme court — a procedure that will probably be changed during 1992. The last section proposes refinements to the procedures for transfer to the supreme court, which would help lawyers direct the most important cases to the state's court of last resort.

I. RECENT DEVELOPMENTS IN APPELLATE PROCEDURE

The 1991 amendments to the Indiana Rules of Appellate Procedure will be helpful to the appellate practitioner. One change clarifies the time for filing the praecipe and record of proceedings in interlocutory

6. See Indiana Supreme Court Order of November 14, 1988 (amending IND. APP. R. 4(A)(7)), reprinted in 528-529 N.E.2d XLI (Ind. cases ed.).

7. In 1988, the Indiana Supreme Court issued 328 total opinions, of which 33 (10%) were civil transfer opinions. See Division of State Court Administration, 1988 Indiana Judicial Report Vol. I at 13. In 1991, the court issued 202 total opinions, of which 51 (25%) were civil transfer opinions. See Division of State Court Administration, 1991 Indiana Judicial Report (forthcoming).

8. Chief Justice Randall T. Shepard, *Foreword: Indiana Law, the Supreme Court, and a New Decade*, 24 IND. L. REV. 499, 520 (1991) [hereinafter Shepard, *Foreword*].

9. Erik Hromadka, *Shepard Reviews 1991, Plans for 1992*, IND. LAW., Jan. 1, 1992, at 22, col. 4.

appeals.¹⁰ Another amendment allows a United States District Court sitting in the state to certify a question of Indiana law to the state supreme court.¹¹ A third amendment adds an entirely new procedure for discretionary appeals from the tax court to the supreme court.¹² This last amendment is the most significant primarily because it may be a prelude to the supreme court's adoption of new procedures for the far greater number of discretionary appeals from the court of appeals. These recent development are discussed in turn.

A. Time Deadlines for Filing the Praeceptum and Record of Proceedings in Interlocutory Appeals

The supreme court amended the appellate rules, effective January 1, 1992, to provide that in permissive interlocutory appeals under Indiana Appellate Rule 4(B)(6) a praecipe shall be filed no later than ten days after the court of appeals grants the petition for interlocutory appeal.¹³ In all other interlocutory appeals, the praecipe shall be filed within thirty days after the entry of the order being appealed.¹⁴ The record of proceedings in all interlocutory appeals must be filed no later than thirty days from the date the praecipe is filed.¹⁵

Prior to these amendments, the appellate rules did not expressly provide a time limit for filing a praecipe in interlocutory appeals and were unclear as to the time for filing the record of proceedings in discretionary interlocutory appeals under Indiana Appellate Rule 4(B)(6). The prior version of Indiana Appellate Rule 3(B) only provided that "[i]n appeals and reviews of interlocutory orders, the record of proceedings shall be filed *within thirty (30) days of the ruling.*"¹⁶ For interlocutory appeals as a matter of right under Indiana Appellate Rule 4(B)(1) through (5), the record of proceedings previously was due thirty days after the trial court's order, no matter when the party taking the interlocutory appeal filed the praecipe. The amendments now allow for the filing of a praecipe thirty days after the trial court's ruling, with the record of proceedings due an additional thirty days from the date the praecipe is filed.

For permissive interlocutory appeals under Indiana Appellate Rule 4(B)(6), there previously were three possible dates from which the thirty

10. IND. APP. R. 2(A) (effective January 1, 1992); IND. APP. R. 3(B) (effective January 1, 1992).

11. IND. APP. R. 15(O) (effective July 2, 1991).

12. IND. APP. R. 18 (effective January 1, 1992).

13. IND. APP. R. 2(A) (effective January 1, 1992).

14. *Id.*

15. IND. APP. R. 3(B).

16. *Id.* (emphasis added).

day period for filing the record of proceedings could be calculated: (1) the trial court's original ruling; (2) the trial court's ruling certifying the issue for appeal; or (3) the court of appeals' ruling accepting the petition for appeal.¹⁷ The court of appeals previously held that the third possible date—thirty days from the date the court of appeals found the matter appealable—was the correct interpretation.¹⁸ One judge dissented, concluding that the majority had promulgated a "new rule of appellate procedure."¹⁹ The amendments end the debate by promulgating a new rule clarifying that in appeals taken under Indiana Appellate Rule 4(B)(6) the praecipe shall be filed no later than ten days after the court of appeals grants the petition for interlocutory appeal. The record of proceedings is then due thirty days after the appealing party files the praecipe.

With these amendments, the only remaining ambiguities arise at the start of discretionary interlocutory appeals. In interlocutory appeals under Indiana Appellate Rule 4(B)(6), a lawyer is not required to move the trial court to certify an issue for interlocutory appeal within a certain time. One recent court of appeals decision stated:

[A] person could wait several months or years after an adverse ruling by the trial court, have the trial court certify the issue, file a petition with this court to accept the interlocutory appeal and, if the record of the proceedings was filed within thirty days of this court's ruling accepting the petition for appeal, the appeal would be deemed timely.²⁰

Although it is unlikely that a trial court would certify an issue "several months or years" later, the plain language of the amended rules would permit such a delayed certification. In addition, the rules do not provide time limits to petition the court of appeals for permission to take an interlocutory appeal after the trial court has certified the issue.²¹ Lawyers taking an interlocutory appeal, however, would be well advised to seek certification in the trial court and the court of appeals as expeditiously as possible to avoid denial of certification on the grounds of laches.

17. *Bayless v. Bayless*, 580 N.E.2d 962, 965 n.3 (Ind. Ct. App. 1991).

18. *Scott v. Bodor, Inc.*, 550 N.E.2d 1326, 1328 (Ind. Ct. App. 1990); *Koehn v. Devereaux*, 495 N.E.2d 211, 214 (Ind. Ct. App. 1986).

19. *Koehn*, 495 N.E.2d at 217 (Staton, J., dissenting).

20. *Bayless*, 580 N.E.2d at 965 n.3 (attorney sought to circumvent the rule by attempting to appeal as if there was a final order and delayed filing record of proceedings more than 195 days after trial court's denial of motions).

21. In the federal system, a party must petition the federal court of appeals for permission to take a discretionary interlocutory appeal within 10 days after the district court certifies an order not otherwise appealable. 28 U.S.C. § 1292(b) (1988); FED. R. APP. P. 5(a).

B. Certified Questions of Indiana Law From United States District Court to State Supreme Court

The Indiana Supreme Court's increased control over its docket since 1988 prompted one judge of the Seventh Circuit to suggest greater use of certified questions.²² Judges in the United States District Court for the Northern District of Indiana also suggested extending the certified question procedure to include district courts.²³ On July 2, 1991, the Indiana Supreme Court amended the rule to allow a district court sitting in Indiana to certify questions of state law to the state supreme court.²⁴

A recent Seventh Circuit decision illustrates an instance in which a federal district court sitting in Indiana may have wished to certify a question of Indiana law to the state supreme court.²⁵ The Seventh Circuit reversed a district court's decision based on recent and dispositive Indiana case law that had not been handed down when the district court ruled: "We note that the Indiana Supreme Court (and the Indiana Court of Appeals) issued their decisions in *Snodgrass* after the District Court had ruled in this case. Thus, the district judge did not have the benefit of these definitive Indiana decisions."²⁶ The new certification process would have allowed the district court sitting in Indiana to certify the question to the state supreme court. The supreme court first accepted certification from a United States District Court on March 13, 1992.²⁷

Only a "United States District Court *sitting in Indiana*" is allowed to certify a question to the state supreme court.²⁸ Federal district courts sitting *outside* of Indiana, however, also apply Indiana law. When the forum state's choice-of-law rules dictate that Indiana substantive law applies or when a contract provides that Indiana law governs, the federal court would apply Indiana law even though the district court was outside the state.²⁹ The amendment does not permit federal district courts outside Indiana to certify a question of state law to the Indiana Supreme Court. The purpose behind expanding certification to district courts does not suggest such a limitation, but the Indiana Supreme Court may simply

22. *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128, 142 (7th Cir. 1990) (Ripple, J., dissenting).

23. Shepard, *Foreword*, *supra* note 8, at 501 n.6.

24. IND. APP. R. 15(O) (effective July 2, 1991).

25. *Allied Signal, Inc. v. Acme Serv. Corp.*, 946 F.2d 1295 (7th Cir. 1991).

26. *Id.* at 1296 n.2 (citing *Indianapolis Power & Light Co. v. Brad Snodgrass, Inc.*, 548 N.E.2d 1197 (Ind. Ct. App. 1990)).

27. *Stump v. Commercial Union*, No. 02S00-9203-CQ-169 (Ind. March 13, 1992) (order accepting certification).

28. IND. APP. R. 15(O) (emphasis added).

29. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 187 (1971).

have placed a reasonable limitation on certification to ensure control of the docket.³⁰

C. New Procedures from the Indiana Tax Court To the State Supreme Court: Prelude to Change

The most dramatic change in the state's appellate rules is the entirely new procedure for appeals from the Indiana Tax Court to the Indiana Supreme Court.³¹ The new rule has some similarities to the existing procedures for transfer from the court of appeals to the supreme court: a petition for rehearing is not mandatory, a petition for review must set forth briefly the same information required by a petition to transfer, no petition for rehearing will be permitted upon the denial of petition for review, no extension of time will be granted for filing a petition for review, and if the supreme court is equally divided, review will be deemed denied and the lower court's decision shall become the law of the case.³² The three major differences in the new rule indicate, however, that the Indiana Supreme Court has taken the initial steps in refining the appellate process.

First, the rule permits two briefs: a preliminary brief and, if review is granted, a brief on the merits.³³ The preliminary brief is optional and can be filed simultaneously with a petition for review. The preliminary brief is limited to ten pages. Any brief opposing the petition for review cannot exceed ten pages in length and must be filed within twenty days of the filing of the petition. The supreme court will not grant extensions of time for filing a petition for review or any preliminary brief.³⁴ If the supreme court denies the petition for review, no petition for rehearing will be considered.³⁵ If the supreme court grants review, the petitioner has thirty days to file a brief on the merits that does not exceed fifty pages.³⁶ The respondent shall file a brief on the merits not to exceed fifty pages within thirty days of the filing of the petitioner's brief.³⁷ The petitioner then has fifteen days to file any reply brief on the merits, and the reply brief must not exceed twenty-five pages.³⁸ For good cause

30. A justice of the Indiana Supreme Court informally confirmed this statement.

31. IND. APP. R. 18 (effective January 1, 1992).

32. Compare IND. APP. R. 18 (petitions for review from the tax court) with IND. APP. R. 11(B) (petitions for transfer from the court of appeals).

33. IND. APP. R. 18(E).

34. IND. APP. R. 18(H)(4).

35. IND. APP. R. 18(H)(1).

36. IND. APP. R. 18(E)(2).

37. *Id.*

38. *Id.*

shown, the supreme court will grant extensions of time for filing the briefs on the merits.³⁹

Second, the supreme court modified the procedures for filing the record of proceedings.⁴⁰ After the filing of a petition for review and the preliminary briefs, the clerk shall transmit to the supreme court the clerk's portion of the record, together with the chronological case summary. The clerk's portion of the record of proceedings need only be contained in case folders with the documents ordered chronologically by filing date. If the supreme court grants review, the petitioner must file any necessary transcripts of evidence or hearings held by the tax court within thirty days of the order granting review. The transcripts must be bound, indexed, paginated, and marginally noted.

Third, the new rule refers to the initial pleading with the supreme court as a "Petition for *Review*," not a "Petition for *Transfer*."⁴¹ The change is more than semantic. The granting of transfer vacates and holds for naught the judgment and opinion or memorandum of the court of appeals.⁴² Procedurally, the appeal comes before the supreme court as though the matter arose in the first instance in the supreme court.⁴³ The appeal has simply been "transferred" from the court of appeals to the supreme court. A petition for review, however, implies that the supreme court will review the lower court's opinion, rather than vacating the opinion and holding it for naught.

These changes in the appellate procedure suggest that the process of "transfer" from the court of appeals to the supreme court could be revised in the near future. The supreme court may institute a two-tier briefing procedure for transfer, separating the decision to review from the decision on the merits. The supreme court may further fine-tune the procedures for compiling the record of proceedings for an appeal. The supreme court may also change the nature of its relationship with the court of appeals from one of "transfer" to one of "review." These changes would help the supreme court assert its law-giving role as the state's court of last resort. To understand the coming changes some historical perspective on the transfer procedures is helpful.

II. HISTORICAL ORIGINS OF TRANSFER FROM THE APPELLATE COURT TO THE SUPREME COURT

The history of Indiana's appellate courts is one of response to growing caseloads. In the early years of statehood, a single supreme court was

39. IND. APP. R. 18(H)(4).

40. IND. APP. R. 18(F).

41. IND. APP. R. 18(D).

42. IND. APP. R. 11(B)(3).

43. *Kraus v. Lehman*, 84 N.E. 769, 770 (Ind. 1908).

sufficient. When the supreme court's caseload grew, the legislature simply added judges, as they were then known, to the supreme court. Once the general assembly exhausted that option by reaching the constitutional limit, it added commissioners, precursors to today's judicial law clerks. Commissioners drafted opinions for review by the supreme court. Later, the legislature added an intermediate appellate court, resulting for the first time in a need to transfer cases from the appellate court to the supreme court. The legislature added panels to the appellate court in 1901, 1972, 1978, and 1990 to respond to growing appellate caseloads. This growth of the intermediate appellate court has focused the supreme court's attention on the manner in which it selects cases from that court to review on the merits.

A. Early Years of the Indiana Supreme Court (1816-1891)

The Indiana Supreme Court has existed since 1816, the year the citizens adopted the state constitution and Congress admitted Indiana into the United States. The first state constitution provided: "[T]he judiciary power of this State, both as to matters of law and equity, shall be vested in one Supreme Court, in Circuit Courts, and in *such other inferior Courts* as the General Assembly may from time to time direct and establish."⁴⁴ The three judges of the Indiana Supreme Court first gathered at Corydon on May 5, 1817.⁴⁵ The people later moved the seat of state government to Indianapolis, and the supreme court commenced its first term there on May 2, 1825.⁴⁶

The state constitution of 1851 incorporated, with minor amendments, the previous constitutional provision providing for the supreme court: "The judicial power of the State shall be vested in a Supreme Court, in Circuit Courts, and in *such inferior courts* as the General Assembly may establish."⁴⁷ The 1851 state constitution also reorganized the supreme court by making the judges subject to election and providing that their number would be "not less than three, nor more than five judges."⁴⁸ The general assembly immediately expanded the supreme court to add one judge, for a total of four.⁴⁹

Twenty years later, the general assembly responded to a burgeoning appellate backlog by providing for an additional judgeship, bringing the court to the constitutional maximum of five.⁵⁰ Also, the supreme court's

44. IND. CONST. art. V, § 1 (1816) (emphasis added).

45. LEANDER J. MONKS, COURTS AND LAWYERS OF INDIANA 181 (1916).

46. 1 Blackf. 343 (Ind. 1825).

47. IND. CONST. art. VII, § 1 (1851) (emphasis added).

48. *Id.* § 2.

49. 1852 Ind. Acts ch. 20.

50. 1872 Ind. Acts ch. 20 (spec. sess.).

earlier interpretation of the phrase "such inferior courts" in the state constitution implied that the legislature could not create courts on a parity in rank and jurisdiction with the circuit courts, such as an intermediate appellate court.⁵¹

The state's population and industrial economy grew rapidly from 1870 to 1890.⁵² The five judges of the Indiana Supreme Court wrote more opinions in an attempt to address their growing appellate docket, but they fell further behind.⁵³ The population and economic growth caused too much of an increase in the supreme court's caseload to be handled by the five judges.

In 1877, the general assembly proposed an amendment to article VII, § 1 of the constitution—striking the word "inferior" and substituting the word "other"—which was ratified by the voters of the state and finally made a part of the constitution on March 14, 1881.⁵⁴ Rather than create a permanent intermediate appellate court, however, the legislature sought temporary solutions.

The state legislature first responded in 1881 by creating a board of commissioners.⁵⁵ The supreme court selected five commissioners to prepare a draft opinion for approval by the other commissioners, which was then submitted to the supreme court.⁵⁶ The legislature intended for the commissioners to be utilized for two years, but in 1883, the legislature extended the life of the commissioner system for two more years.⁵⁷ By 1885, the supreme court was temporarily relieved of its congested docket, and the legislature did not extend the tenure of the commissioners or

51. See *Cropsey v. Henderson*, 63 Ind. 268, 271 (1878); *Clem v. State*, 33 Ind. 418, 421 (1870).

52. The state's population expanded rapidly during this time:

1870	1,681,000
1880	1,978,000
1890	2,192,000

1 Bureau of the Census, U.S. Dep't of Commerce, *Historical Statistics of the United States, Colonial Times to 1970* at 27, Series A, at 195-209 (1975).

53. The number of opinions issued by the Indiana Supreme Court grew rapidly during the period:

1870	332 opinions
1880	435 opinions
1890	546 opinions

See cases reported in volumes 32 to 35 of *Indiana Reports*, volumes 69 to 73 of *Indiana Reports*, and volumes 124 to 128 of *Indiana Reports*.

54. The supreme court holding in *State v. Swift*, 69 Ind. 505 (1880) that a constitutional amendment must pass by a majority of all voters delayed the ratification of the constitutional amendment.

55. 1881 Ind. Acts ch. 17, § 1.

56. *MONKS*, *supra* note 45, at 297-99.

57. 1883 Ind. Acts ch. 60, § 1.

create a new intermediate appellate court as some states had done to relieve docket pressure on the state supreme court.⁵⁸

By 1889, however, the supreme court had another backlog of appeals. The legislature again created a commission, with one difference—the legislature, rather than the supreme court, would select the commissioners.⁵⁹ The supreme court struck down the act as unconstitutional.⁶⁰ Chief Judge Byron Elliot writing for a unanimous court stated, “The power of deciding, the duty of deciding, and the duty of writing the opinions, is specifically imposed upon the court.”⁶¹

The legislature could not add additional judges to the supreme court and was reluctant to allow the supreme court to select new commissioners. Although the state constitution had been amended in 1881 to allow for an intermediate appellate court, the legislature was wary of the cost of having a permanent appellate court.⁶² The solution was a temporary appellate court with the supreme court to assume jurisdiction over all appeals at the expiration of the appellate court.

*B. The Appellate Court: Court of Last Resort For Minor Matters
(1891-1901)*

The legislature created a second appellate court on February 28, 1891.⁶³ Then known as the Appellate Court of Indiana, it consisted of five judges who had *final* jurisdiction over minor matters, such as all cases for recovery of less than one thousand dollars.⁶⁴ When a party had plausible grounds to challenge the validity of a federal or state statute, the appellate court was to certify the matter and transmit the transcript and all papers to the supreme court “as if said cause had been originally appealed to the Supreme Court.”⁶⁵ The statute provided:

When the Appellate Court shall be organized and ready to proceed with business, the Supreme Court shall, by an order entered upon its record, *transfer* to it all cases then pending in such Supreme Court of the nature and description of those of which jurisdiction is by this act given to said Appellate Court. . . . and the action of said Appellate Court shall have the same force

58. See Robert A. Kagan et al., *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 128-32 (1977).

59. 1889 Ind. Acts ch. 32, § 1.

60. *State ex rel. Hovey v. Noble*, 21 N.E. 244, 252 (Ind. 1889).

61. *Id.* at 249.

62. CHARLES N. TAYLOR, *THE BENCH AND BAR OF INDIANA* 79 (1895).

63. 1891 Ind. Act ch. 37.

64. *Id.* § 1.

65. *Id.*; *Benson v. Christian*, 29 N.E. 26 (Ind. 1892).

and effect in all respects as if the said cause had been heard and disposed of by the Supreme Court.⁶⁶

The legislature also provided for "transferring" appeals not taken to the proper court.⁶⁷

For example, if an appeal was taken to the supreme court that should have been taken to the appellate court, the supreme court had the duty, on its own motion, to "transfer" the cause to the appellate court.⁶⁸ The appellate court had the same duty to "transfer" an appeal to the supreme court if it properly belonged there.⁶⁹ "Transfer" was at first not a procedure for the supreme court to review the decisions of the appellate court, but rather to place the appeal in the proper court.

Although transfer was meant to provide a procedure for placing the appeal in the proper court, it was also clear that the appellate court was to follow the law declared by the supreme court. The legislature expressly stated that the supreme court's decisions governed any conflict: "The Court created by this act shall be governed in all things by the law as declared by the Supreme Court of this State and it shall not directly nor by implication reverse or modify any decision of the Supreme Court of this State."⁷⁰ The appellate court was to be in existence for "six years from the first day of March, 1891, and no longer, at the end of which time the Supreme Court shall assume jurisdiction of all causes pending in and other business of said Appellate Court as if this act had never been passed."⁷¹

On March 10, 1891, the supreme court, on the petition of the clerk, entered an order transferring appeals to the newly created appellate court.⁷² Judge Elliot wrote:

It is so evident that the act recognizes the general and superior appellate jurisdiction of the supreme court that little else is required than the bare statement that the appellate authority not expressly or impliedly vested in the newly-created tribunal remains where the constitution and the law place it, in the supreme court of the state. . . . It carves out of the general appellate jurisdiction

66. 1891 Ind. Acts ch. 37, § 19 (emphasis added).

67. *Id.* § 25.

68. *Id.*

69. *Id.* The procedure of transfer both ways still exists today. See IND. APP. R. 4(D); IND. APP. R. 15(M).

70. 1891 Ind. Acts ch. 37, § 25.

71. *Id.* § 26.

72. *Ex parte Sweeney*, 27 N.E. 127 (Ind. 1891).

of the state a part, and *transfers* it to the court it creates. . . . What is not expressly or by necessary implication *transferred* to the new tribunal abides in the old.⁷³

The supreme court transferred other appeals as they arose that were "within the exclusive jurisdiction of the appellate court."⁷⁴ However, the jurisdiction of the appellate court was not made broad enough, and consequently, the supreme court was still burdened by too many appeals.⁷⁵

Lawyers also objected to the lack of a procedure for appealing from the appellate court to the supreme court. A contemporary noted, "Those objections arose chiefly from the fact that the decisions [the appellate court] rendered, while from the Court of last resort as to the cases in which they were rendered, were not from the Court of last resort in the State."⁷⁶ One attorney challenged the constitutionality of the legislation creating the appellate court, but the supreme court held that the legislature could create an appellate tribunal inferior to the supreme court by limiting the jurisdiction to cases not of the highest grade.⁷⁷

In order to divide the docket more evenly between the appellate court and the supreme court, the legislature raised the maximum amount-in-controversy for jurisdiction from one thousand dollars to three thousand five hundred dollars.⁷⁸ The supreme court transferred appeals involving less than three thousand five hundred dollars to the appellate court.⁷⁹ Even this increase of the appellate court's jurisdiction did not divide the work equally between the two courts.⁸⁰

73. *Id.* (emphasis added).

74. *Baker v. Groves*, 26 N.E. 1076 (Ind. 1891). *See also* *City of Hammond v. New York, C. & St. L. Ry Co.*, 27 N.E. 130 (Ind. 1891); *Parker v. Indianapolis Nat'l Bank*, 26 N.E. 881 (Ind. 1891).

75. TAYLOR, *supra* note 62, at 55.

76. *Id.* at 80.

77. *Branson v. Studebaker*, 33 N.E. 98, 99 (Ind. 1892). The opinion contains an eloquent exposition on the role of the supreme court:

There must be in every State a court capable of exercising ultimate judicial power; otherwise there would be unending conflict. In this State there is a court invested with ultimate judicial power, and this is the supreme court. If it were otherwise, there would be no organ of government capable of authoritatively and finally settling judicial questions and that there must be such an organ there can be no doubt, for the judicial department is an independent one, and the element of sovereignty delegated to that department must, as in the case of the executive and legislative, reside in its last and highest form in one tribunal, one officer or body of officers. But, while we are clear that no statute can deprive the supreme court of its rank as the highest and ultimate repository of judicial power, we are equally clear that appellate jurisdiction of an inferior grade may be conferred upon other appellate tribunals.

Id. (citation omitted).

78. 1893 Ind. Acts. ch. 32, § 1; TAYLOR, *supra* note 62, at 80.

79. *City of Huntington v. Burke*, 38 N.E. 597 (Ind. 1894).

80. *Id.*

More important than its attempt to divide the appellate docket evenly, the 1893 act provided a procedure for the *appellate court* to transfer an appeal to the supreme court:

That in any case pending in the Appellate Court, in which said Appellate Court shall conclude that any decision of the Supreme Court should be overruled or modified, it shall be their duty to *transfer* said cause, with their opinion of what the law should be held to be, to the Supreme Court, and the Supreme Court shall thereupon have jurisdiction of and decide the entire case, the same as if it had original jurisdiction thereof, and it may either modify, overrule or affirm its former decision, on that question as it shall deem right, and such decision of the Supreme Court shall be final.⁸¹

Although the statute only gave the appellate court authority to transfer an appeal to the supreme court, crafty lawyers still sought to get their appeals before the supreme court. One attorney used a writ of mandamus to challenge the jurisdiction of the appellate court as an alternative to transfer, but the supreme court rebuffed the challenge.⁸² Another attorney stated in his brief, "Private property can only be taken for public purpose upon just compensation given," in an attempt to create a constitutional question solely within the province of the supreme court.⁸³ The supreme court denied the petition for a writ of mandate, holding that no constitutional question was duly presented.⁸⁴ Similarly, when a party had a constitutional claim but failed to argue it in its brief, the supreme court would transfer the matter to the appellate court.⁸⁵

In addition to petitions for writs of mandate and cursory constitutional arguments, lawyers attempted to use petitions for writs of certiorari to challenge appellate court decisions in the supreme court. The supreme court quickly ended the practice:

We are of the opinion . . . that no authority is shown in the petition before us for a writ of certiorari from this court to the appellate court. The act creating that court provides expressly for a court of final resort, although with certain defined and limited jurisdiction. In all cases in which the appellate court is given jurisdiction its decisions are made final, and not subject

80. *Id.*

81. 1893 Ind. Acts. ch. 32, § 3 (emphasis added).

82. State *ex rel.* Kiley v. Gavin, 34 N.E. 989 (Ind. 1893).

83. Pittsburgh, C., C. & St. L. Ry Co. v. Hays, 47 N.E. 151 (Ind. 1897).

84. *Id.* at 153.

85. Lewis v. Albertson, 49 N.E. 34 (Ind. 1898).

to review, whether by appeal or by writ of certiorari. The evident purpose of the legislature was not to provide for an intermediate court, but for one of last resort.⁸⁶

The supreme court continued by noting that in the creation of the United States Circuit Court of Appeals, Congress made express provision for transferring cases to the Supreme Court in all matters, either by appeal or by certiorari.⁸⁷ In the act creating the appellate court no procedure was provided, however, to advance from the appellate court to the supreme court, "nor [was] there anything in the constitution or laws from which it might be implied."⁸⁸ The absence of a procedure for appealing generated controversy.⁸⁹ The supreme court had no supervisory authority over the decisions of the appellate court.⁹⁰ The appellate court, so the argument went, was coordinate with the supreme court:

[O]n account of the supposed absence of authority on the part of the Supreme Court to exercise in some manner a revisory or reviewing right over the decision of the Appellate Court in order to make them conform, if necessary, to the ruling precedents of the Supreme Court, and thereby keep them in harmony with those of the latter court, two lines of decision were created. Consequently there arose much confusion in respect to the law which would control in a particular case. Under the circumstances as they then existed, that question seemingly depended upon the court . . . to which the cause might finally be appealed.⁹¹

The lack of a procedure for advancement from the appellate court to the supreme court may have resulted from the temporary nature of the appellate court. In 1897, the general assembly extended the appellate court's existence for another four years.⁹² In 1899, the legislature added two additional years.⁹³ Finally, in 1901, the general assembly relented and made the appellate court a permanent body.⁹⁴

C. Transfer From the Appellate Court to the Supreme Court (1901-1940)

In 1901, the appellate court's function shifted from a court of last resort over minor matters to an intermediate appellate court. The leg-

86. *Newman v. Gates*, 49 N.E. 826, 827 (Ind. 1898).

87. *Id.* (citing *Forsyth v. Hammond*, 166 U.S. 506 (1897)).

88. *Id.*

89. *See Ex parte France*, 95 N.E. 515 (Ind. 1911) (clerk of supreme court petitioned for directions about his official statutory duty).

90. *Id.*

91. *Id.* at 520.

92. 1897 Ind. Acts ch. 9, § 3.

93. 1899 Ind. Acts ch. 22, § 1.

94. 1901 Ind. Acts ch. 247, § 19.

islature added one judge to the appellate court, for a total of six, and instructed the court to sit in two divisions, designated as the Appellate Court of Indiana, Divisions Number One and Two, respectively.⁹⁵ Rather than specifying the cases over which the appellate court had final jurisdiction, as in prior statutes, the 1901 act provided that "[n]o appealable case shall hereafter be taken directly to the Supreme Court unless it be within" a list of nine classes of appeals with "[a]ll other appealable cases . . . taken to the Appellate Court."⁹⁶

Appeals could be transferred to the supreme court.⁹⁷ A party, after seeking rehearing in the appellate court, could file an application for transfer of the case to the supreme court on the ground that the opinion of the appellate court (1) contravened a ruling precedent of the supreme court or (2) erroneously decided a new question of law. If the application for transfer was granted, the supreme court vacated the judgment of the appellate court and transferred the cause to the docket of the supreme court. The purpose of authorizing transfers from the appellate court to the supreme court was to give the supreme court "a revising hand over the opinions of the Appellate Court, when necessary, in order to control the declaration of legal principles."⁹⁸ This basic procedure for transfer has survived to the present—more than ninety years.

The judges of the supreme and appellate courts were involved in the drafting of the legislation providing for a permanent appellate court.⁹⁹ The provision for transfer from the appellate court to the supreme court was modeled after a provision of the Act of Congress of March 3, 1891, which created the federal circuit courts of appeals.¹⁰⁰ This Act provided that decisions of the federal courts of appeals would be reviewed by writs of certiorari to the United States Supreme Court.¹⁰¹

95. *Id.* § 2.

96. *Id.* § 9.

97. *Id.* § 10. This section provided two other grounds for transfer. First, if two judges of the appellate court were of the opinion that a ruling precedent of the supreme court was erroneous, the case, with a written statement of the reasons for such an opinion, would be transferred to the supreme court. Second, the losing party in the appellate court had a right to appeal the cause to the supreme court when the amount in controversy exceeded six thousand dollars. These other grounds for transfer are not discussed in this Article because they do not deal with transfers over which the supreme court had discretionary review.

98. *Ex parte France*, 95 N.E. 515, 520 (Ind. 1911) (citing *United States Cement Co. v. Cooper*, 88 N.E. 69 (Ind. 1909); *Klein v. Nugent Gravel Co.*, 70 N.E. 801 (Ind. 1904)).

99. *Id.*

100. *Id.* (citing Act of March 3, 1891, ch. 517, 26 Stat. 826 (1901)).

101. *Forsyth v. Hammond*, 166 U.S. 506 (1897). Justice Brewer, speaking for the Court regarding the act of Congress creating the Circuit Courts of Appeals, said:

Near the end of 1901, the Indiana Supreme Court construed the transfer process as a means to protect the law-giving role of the state's court of last resort:

The plain purpose of the subdivision in question, however, was not to give this court jurisdiction to determine whether the facts in cases which are not appealable here as a matter of right have been correctly understood and stated by the appellate court, but to authorize this court to control the declaration of legal principles.¹⁰²

The supreme court examined a written opinion of the appellate court to determine whether the petitioner's grounds assigned for the transfer had merit without examining the record of proceedings or the parties' briefs filed in the appellate court.¹⁰³

The first grant of transfer upon application of a party losing in the appellate court occurred on January 10, 1902.¹⁰⁴ The supreme court opened its opinion simply: "By sustaining appellee's petition for an order of transfer, this court has vacated the decision of the appellate court, and has brought the cause here for final determination."¹⁰⁵ When the supreme court ordered a case transferred from the appellate court, the case was before the supreme court as if appealed directly to the supreme court from the trial court.¹⁰⁶ The bench and bar of the state were satisfied with the new procedure for transfer.¹⁰⁷

Despite general satisfaction with the procedure, one series of transfers rivaled the most famous case in English literature. The proceeding is known as *Jarndyce v. Jarndyce* and is fully reported by Charles Dickens

While this division of appellate power was the means adopted to reduce the accumulation of business in this court, it was foreseen that injurious results might follow if an absolute finality of determination was given to the Courts of Appeal. Nine separate appellate tribunals might by their differences of opinion, unless held in check by the reviewing power of this court, create an unfortunate confusion in respect to the rules of Federal decision. . . . Cases of a class in which finality of decision was given to the Circuit Courts of Appeal might involve questions of such public and national importance as to require that a consideration and determination thereof should be made by the supreme tribunal of the nation.

Id. at 512. Interestingly, this case arose in Indiana and was argued by Benjamin Harrison.

102. *Barnett v. Bryce Furnace Co.*, 62 N.E. 6, 7 (Ind. 1901).

103. *American Quarries Co. v. Lay*, 76 N.E. 517 (Ind. 1906); *City of Huntington v. Lusch*, 71 N.E. 647 (Ind. 1904); *Craig v. Bennett*, 62 N.E. 273 (Ind. 1901).

104. *Payne v. Terre Haute & Indpls. Ry. Co.*, 62 N.E. 472 (Ind. 1902). *See also Oster v. Broe*, 64 N.E. 918 (Ind. 1902).

105. *Payne*, 62 N.E. at 472-73.

106. *Kraus v. Lehman*, 84 N.E. 769, 770 (Ind. 1908).

107. *See Ex parte France*, 95 N.E. 515, 521 (Ind. 1911).

in *Bleak House*. In the Indiana version, a trial court granted a judgment of \$4,000 against a railroad company, which appealed to the appellate court. In February, the appellate court transferred the appeal to the supreme court, noting a constitutional question.¹⁰⁸ In March, the supreme court transferred the appeal back to the appellate court on the ground that the supreme court had previously found the challenged statute valid against the same constitutional attack.¹⁰⁹ The appellate court in June retransferred the case to the supreme court.¹¹⁰ The supreme court in July retransferred the appeal to the appellate court, stating the supreme court's initial ruling should be considered final.¹¹¹ In January of the next year, the appellate court retransferred the appeal to the supreme court when four judges of the appellate court could not agree upon a decision.¹¹² In the interim, the appellee died.

This transfer procedure remained unchanged until 1911, when the state legislature repealed the section providing for transfer to the supreme court. The general assembly returned to the old thinking that a decision of the appellate court would be final.¹¹³ The 1911 act also rearranged the dividing line between the jurisdiction of the supreme court and the appellate court by substantially increasing the jurisdiction of the latter.

The supreme court quickly struck down the legislation in the case of *Ex parte France*.¹¹⁴ The clerk had petitioned the supreme court for instructions as to the transfer of cases to conform to the new jurisdiction of the appellate court. The supreme court reviewed its own constitutional history and the legislative and political history of the appellate court. The supreme court held that the state constitution specially invested it with final appellate jurisdiction and that the legislature had no constitutional authority to create an intermediate appellate court whose decisions were not subject to review by the supreme court.¹¹⁵ The supreme court further held that the legislation was invalid because it gave the appellate court jurisdiction in cases that were not minor.¹¹⁶

Two years later, the legislature again undertook to repeal the provision permitting transfer to the supreme court.¹¹⁷ The supreme court

108. Pittsburgh, C., C. & St. L. Ry Co. v. Peck, 87 N.E. 153 (Ind. App. 1909).

109. Pittsburgh, C., C. & St. L. Ry Co. v. Peck, 87 N.E. 644 (Ind. 1909).

110. Pittsburgh, C., C. & St. L. Ry. Co. v. Peck, 88 N.E. 627 (Ind. App. 1909) (holding that the supreme court erred in retransferring case because appellate court was divested of jurisdiction upon the original transfer to the state supreme court).

111. Pittsburgh, C., C. & St. L. Ry. Co. v. Peck, 88 N.E. 939, 944 (Ind. 1909).

112. Pittsburgh, C., C. & St. L. Ry. Co. v. Peck, 90 N.E. 339 (Ind. App. 1910).

113. 1911 Ind. Acts ch. 117, § 4.

114. 95 N.E. 515, 521-22 (Ind. 1911).

115. *Id.*

116. *Id.* at 522.

117. 1913 Ind. Acts ch. 166.

again struck down the legislation on the same grounds, but curiously, it did not rely upon *Ex parte France*.¹¹⁸ One commentator has speculated that the omission may be related to the fact that the *France* appeal was not an adversary proceeding, at least in form.¹¹⁹

In 1931, the supreme court retreated somewhat from its absolutist position in *Ex parte France*. The legislature passed an act that gave the appellate court final jurisdiction over appeals from misdemeanor convictions.¹²⁰ The supreme court ruled that the act was constitutional.¹²¹ Approximately ten years later, however, the supreme court repeated its doubts concerning the constitutional authority of the legislature to make a decision of the appellate court final:

Uniformity in the interpretation and application of the law is the keystone of our system of jurisprudence. . . . [U]niformity cannot be attained or preserved if the courts that interpret and apply the laws are not required to take their controlling precedents from some common source. If other courts than this court are to be permitted to construe statutes and state rules of substantive law, *without recourse being provided for review by this court*, the result will be . . . destructive

We are not unmindful that it has been many times said that there is no inherent right to appeal any case to this court and that it is for the Legislature to say what cases may and what may not be brought here. . . . We therefore disapprove of the language contained in the many cases which seem to suggest that the right of appeal to this court exists only by the grace of the legislative branch of the government.¹²²

When the legislature created the appellate court in 1891, a debate began over whether the appellate court was an intermediate appellate court

118. *Curless v. Watson*, 102 N.E. 497 (Ind. 1913).

119. BERNARD C. GAVIT, *INDIANA PLEADING AND PRACTICE* § 503, at 2492 (1942).

120. 1929 Ind. Acts ch. 123, § 1.

121. *In re* Petition to Transfer Appeals, 174 N.E. 812 (Ind. 1931).

122. *Warren v. Indiana Tel. Co.*, 26 N.E.2d 399, 405-06 (Ind. 1940) (emphasis added). This case probably was the genesis for an additional ground for transfer:

When a proper showing is made in and as a part of the petition to transfer that the Appellate Court has failed to consider and pass upon a substantial question duly presented to it, this court will examine the record, papers, and briefs in the same manner and to the same extent as if these had been brought up by a writ of error.

Id. at 407-08. Failure to consider a substantial question duly presented to the appellate court later became a third ground for transfer, adding to the two previous grounds for transfer in existence since 1901: the opinion of the appellate court (1) contravenes a ruling precedent of the supreme court or (2) erroneously decides a new question of law.

subject to the supervisory power of the supreme court or a court of last resort regarding minor matters. In 1940, the debate came to a conclusion: the appellate court was an intermediate court of appeals, and the supreme court had the final authority to review the appellate court's decision under the state constitution.

*D. Constitutional Court: The Court of Appeals of Indiana
(1940-Present)*

The right of a losing party to transfer a case from the appellate court to the supreme court was firmly fixed, and thus, attention shifted from statutes to court rules. The supreme court's procedures for transfer were and are embodied within Indiana Appellate Rule 11(B). Although it may seem strange today that a heavily used procedure such as transfer is only a subsection of a larger rule, prior to the constitutional amendment in 1988 limiting direct criminal appeals to the supreme court, transfers were rarely granted.¹²³

At first, transfer was not a tool commonly needed because Indiana had only two panels of the appellate court that issued few conflicting opinions. The intermediate appellate court grew significantly, however, during the 1970s and 1980s. As a part of substantial amendments to the judicial article in 1970, the Indiana Constitution now provides for an intermediate appellate court, called the Indiana Court of Appeals:

The judicial power of the State shall be vested in one Supreme Court, one Court of Appeals, Circuit Courts and such other courts as the General Assembly may establish.¹²⁴

. . . .

The Court of Appeals shall consist of as many geographic districts and sit at such locations as the General Assembly shall determine to be necessary. Each geographic district of the Court shall consist of three judges. . . .¹²⁵

As a part of the legislation implementing the constitutional amendment, the general assembly expanded the court of appeals to three districts consisting of three judges each.¹²⁶ In 1978, the legislature again expanded

123. From 1976 to 1988, civil transfer opinions were less than 10% of the supreme court's total opinions, except for 1981, when 13% of the supreme court's total opinions were on civil transfer.

124. IND. CONST. art. VII, § 1 (amended 1970).

125. *Id.* § 5 (amended 1970). One wonders whether this constitutional provision would permit a statutory reform structuring the court of appeals into three geographic units of five judges sitting in panels of three.

126. Pub. L. No. 427, § 3, 1971 Ind. Acts (codified at IND. CODE § 33-2.1-2-2 (1988)).

the court of appeals, this time adding three judges for a fourth district.¹²⁷ In 1990, three more judges were added forming a fifth district.¹²⁸

The growth in districts naturally resulted in a greater number of conflicting decisions among the districts. During the 1970s, the supreme court expanded the grounds under Indiana Appellate Rule 11(B)(2) for transfer:

- (c) that there is a conflict between the opinion or memorandum decision and a prior opinion of the Court of Appeals stating concisely the conflict and opinion in which it occurs, or
- (d) that the opinion or memorandum decision of the Court of Appeals correctly followed ruling precedent of the Supreme Court, but such ruling precedent is erroneous or is in need of clarification or modification¹²⁹

These additional grounds are helpful in directing important cases to the supreme court.

Also during the 1970s, the criminal docket was expanding.¹³⁰ The burgeoning criminal docket crowded out important civil matters that needed to be clarified or modified and inadvertently turned the court of appeals into a court of last resort on civil matters. The historic problem that Indiana faced with its appellate system resurfaced: the supreme court was not able to function as the court of last resort on all matters as provided by the state constitution.

The 1988 constitutional amendment limiting direct appeals of criminal cases to the supreme court has allowed the supreme court to create a more balanced docket of criminal and civil appeals. With five districts of the court of appeals generating opinions, the pressure on the supreme court in the coming years will be to develop a comprehensive procedure for selecting cases to consider. The procedures for transfer to the supreme court should be revised to help lawyers direct the most important cases in the state to its court of last resort.

III. NEW PROCEDURES TO REACH THE SUPREME COURT: RETURNING TO THE ORIGINAL MODEL OF TRANSFER

The judges of the supreme and appellate courts who developed the original procedure for transfer in 1901 modeled it on the procedure for certiorari from the federal courts of appeals to the United States Supreme

127. Pub. L. No. 137, § 1, 1978 Ind. Acts (codified at IND. CODE § 33-2.1-2-2 (1988)).

128. Pub. L. No. 158, § 1, 1990 Ind. Acts (codified at IND. CODE ANN. § 33-2.1-2-2 (1988)).

129. IND. APP. R. 11(B)(2).

130. Shepard, *Changing*, *supra* note 4, at 682.

Court.¹³¹ The Indiana Supreme Court should return to this model when developing a new procedure for transfer. The United States Supreme Court is asked to review 5,000 cases a year, but picks only a small fraction—around 150—for briefing, oral argument, and decision by the full Court. The Indiana Supreme Court, however, receives between 800 and 900 requests for review per year and drafts more than 200 opinions a year. If the United States Supreme Court's procedures can process more than six times as many petitions for writs of certiorari, *a fortiori* such procedures would serve Indiana's appellate needs in the future.¹³²

A comparison of the procedures for petitions for transfer and petitions for writs of certiorari is instructive. First, the decision on whether to grant transfer should be done separately from the decision on the merits, even though the two cannot be completely divorced. In the United States Supreme Court, the important considerations on certiorari are largely unrelated to the merits. Former Chief Justice Vinson said:

Lawyers might be well-advised, in preparing petitions for certiorari, to spend a little less time discussing the merits of their cases and a little more time demonstrating why it is important that the Court should hear them. . . . What the Court is interested in is the actual, practical effect of the disputed decision—its consequences for other litigants and in other situations. A petition for certiorari should explain why it is vital that the question involved be decided finally by the Supreme Court. If it only succeeds in demonstrating that the decision below may be erroneous, it has not fulfilled its purpose.¹³³

The United States Supreme Court relies on a number of criteria. Conflict in the circuits leads the list.¹³⁴ Other dominant factors include whether the issue needs to "percolate" in the lower courts or whether the case is a "good vehicle" to resolve the issue.¹³⁵ Although Indiana's appellate system is not as mature as the federal appellate system, a system that can respond to 5,000 requests for review in one year provides a useful model.

131. *Ex parte France*, 95 N.E. 515, 520 (Ind. 1911).

132. One might also study the procedures of states with large intermediate appellate courts. California, for example, had 77 members on its intermediate appellate court in 1985, and more judges were added in 1987. See 1987 Cal. Stat. ch 1211, §§ 2-4.

133. Speech of Chief Justice Vinson before American Bar Association at St. Louis, September 7, 1949, reprinted in 69 S. Ct. v, vi-vii (1949).

134. Justice White has long expressed the view that certiorari should be granted when there is a conflict, even if he otherwise agrees with the decision below. See *Brown Trans. Corp. v. Atcon, Inc.*, 439 U.S. 1014 (1978) (White, J., dissenting).

135. See H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 278-79 (1991).

The Indiana Supreme Court's current procedures for accepting transfer from the courts of appeals appears to be part of the decision on the merits. The supreme court usually grants transfer on the same day it hands down the opinion. The supreme court should implement a procedure formally separating a decision to grant review from the decision on the merits. In reality, the supreme court already makes a decision on whether to take a case long before an opinion is rendered. Litigants and their counsel should be directly and formally informed whether the supreme court will review their case. Notifications could be published much like the grants and denials of certiorari are published by the United States Supreme Court.

Currently, practitioners do not know when they are hurriedly preparing a petition for transfer whether or not the Indiana Supreme Court will grant transfer.¹³⁶ If litigants knew in advance that review had been granted on particular issues, attorneys could draft higher quality briefs directed to the issues of the court's concern, *amicus curiae* could become more involved in their areas of expertise, and oral argument could easily become a standard part of the decisionmaking process.

Furthermore, separating the decision to review a case from the decision on the merits will help the supreme court select those cases that have statewide importance. The petition for review and preliminary brief need not be long, but must set out the reasons why the Indiana Supreme Court should hear the case regardless of the merits. Many cases will not rise to the level of statewide importance and review will be denied without further briefing. Under this procedural system, the Indiana Supreme Court Administrator's office will be relieved of reviewing overly long briefs that are directed more to the merits of an appeal rather than to why the Indiana Supreme Court should hear the case.¹³⁷

Another difference between petitions for writs of certiorari and transfer is whose decision is being reviewed. A petition for writ of certiorari is directed to a federal court of appeals, not the district court. The United States Supreme Court reviews the opinion of the circuit

136. The Indiana Rules of Appellate Procedure allow a mere 20 days to petition the supreme court for transfer when the court of appeals hands down a decision or denies rehearing. IND. APP. R. 11(B). Few practitioners have the time to digest the opinion of the court of appeals, research the cases cited in the opinion, and prepare a petition to transfer with a supporting brief in only 20 days. Furthermore, no extension of time can be granted for filing a petition to transfer or accompanying brief. IND. APP. R. 11(B)(8). The short time deadline promotes the filing of a petition for rehearing in the court of appeals solely to buy time to review adequately the opinion. In contrast, the U.S. Supreme Court allows 90 days to petition for a writ of certiorari. 28 U.S.C. § 2101(c) (1988).

137. The administrator's office reviews the record and briefs in preparing a memorandum for the supreme court. The memorandum usually includes a recommendation to grant or deny transfer. Shepard, *Changing*, *supra* note 4, at 678.

court, not the district court. Under the current Indiana rules, when transfer is granted, the Indiana Supreme Court technically reviews the trial court's actions, not the court of appeals opinion.¹³⁸ The current appellate rules direct the supreme court to disregard the helpful work of the intermediate appellate court, three judges who collegially thought about a legal problem.¹³⁹ Although the rules direct the supreme court to review the trial court's decision, the reality today is that the supreme court is reviewing the work of the court of appeals.

The rules should be amended to allow the supreme court to review the court of appeals decision. These changes would help the supreme court refine the appellate process to meet the demands of the 1990s and beyond. These suggestions are consistent with the 1991 developments in the appellate rules, particularly the new procedure from the tax court to the supreme court. They are also firmly grounded on the historical origins of the process by directing those cases to the state's highest court where it can declare state law. The procedures should direct the most important appeals to the supreme court, appeals that transcend the litigants: "The question involved is not one merely of private or personal benefit, but is one which concerns all persons of the state, and is not to be tied down solely to the mere rights of litigants."¹⁴⁰ Anything less from the procedures directing cases to the supreme court will limit the constitutional effectiveness of our state's court of last resort.

138. The Indiana Supreme Court recently amended its rules to provide that it may grant transfer and expressly adopt or summarily affirm the opinion of the court of appeals. IND. APP. R. 11(B)(3).

139. *Id.* ("If transfer be granted, the judgment and opinion or memorandum decision of the Court of Appeals shall thereupon be vacated and held for naught").

140. *Ex parte France*, 95 N.E. 515, 518 (Ind. 1911).

State and Federal Constitutional Law Developments Affecting Indiana Law

ROSALIE BERGER LEVINSON*

INTRODUCTION

As the United States Supreme Court continues to narrow the scope of the federal constitution, there has been a movement across the country to explore state constitutions as a largely untapped source for the protection of individual liberty.¹ Indiana has been no exception, and in fact, Chief Justice Shepard has admonished Indiana practitioners over the past few years to re-examine the Indiana Constitution.² Because there has been some significant movement in this direction, Part I of this Article explores recent developments under the Indiana Constitution. Part II focuses on state and federal court cases which raise significant federal constitutional issues implicating Indiana law and Indiana litigants.

I. RECENT DEVELOPMENTS UNDER THE INDIANA CONSTITUTION

Most of the litigation under the Indiana Constitution during the survey period involved the rights of criminal defendants. Many courts cited the Indiana Constitution as a supplemental ground for their rulings,³ but in a growing number of cases, the Indiana Constitution was held to provide a separate and independent source of rights.

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1. See, e.g., Daniel R. Gordon, *Progressive Retreat: Falling Back from the Federal Constitution to State Constitution*, 23 ARIZ. ST. L.J. 801 (1991).

2. Randall T. Shepard, *Indiana Law, the Supreme Court, and a New Decade*, 24 IND. L. REV. 499, 504-07 (1991); Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

3. *Waters v. State*, 574 N.E.2d 911 (Ind. 1991) (the right to counsel in post-conviction proceedings is not guaranteed by either the Indiana or the U.S. Constitutions); *Humphries v. State*, 568 N.E.2d 1033 (Ind. Ct. App. 1991) (state and federal constitutions guarantee persons who are detained for investigatory stop the right to question and argue with the police); *Gould v. State*, 578 N.E.2d 382 (Ind. Ct. App. 1991) (there is no requirement of a public trial during a hearing on a post-conviction remedy under either the U.S. or the state constitutions); *Scrougham v. State*, 564 N.E.2d 542 (Ind. Ct. App. 1991) (the double jeopardy guarantee under the Indiana Constitution is identical to that under the U.S. Constitution); *Hastings v. State*, 560 N.E.2d 664 (Ind. Ct. App. 1990) (Indiana and federal law require that defendant knowingly and intelligently waive his right not to incriminate himself).

In *Brady v. State*,⁴ the Supreme Court of Indiana relied upon the Indiana Constitution to invalidate a state statute which allowed children to testify via videotape in a molestation case.⁵ The court reasoned that although this method did not violate the federal Constitution, Indiana's constitutional guarantee in article I, section 13⁶ of face-to-face confrontation was more specific and thus more protective than the federal guarantee.⁷ In two cases, Indiana appellate courts interpreted article I, section 13 to guarantee the defendant a right to be present during all proceedings. In *Harrison v. State*,⁸ the court held that a communication between the judge and the jury regarding instructions that took place without notice to the defendant violated this section and that a violation creates a presumption of harm.⁹ Similarly, in *Brownlee v. State*,¹⁰ the court held that the trial court committed reversible error by failing to disclose to the defendant the fact that the jury requested replay of recorded alibi testimony.¹¹ Another portion of this section guarantees that the trial take place in the county in which the offense was committed.¹²

Other cases invoked the Indiana constitutional guarantee prohibiting excessive bail or fines¹³ and the requirement that the penal code shall be founded on "principles of reformation, and not of vindictive justice."¹⁴ As to the former, Indiana courts have recognized that although penal sanctions are primarily legislative considerations, a criminal defendant

4. 575 N.E.2d 981 (Ind. 1991).

5. *Id.* at 988.

6. Article I, § 13 provides in pertinent part: "In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof"

7. Article I, § 13 provides in pertinent part: "In all criminal prosecutions, the accused shall have the right . . . to meet witnesses face to face" *Cf. Hart v. State*, 578 N.E.2d 336 (Ind. 1991), which held that the right to meet witnesses face-to-face is in the nature of a privilege which may be waived by a defendant who fails to raise the state constitutional claim at trial. Although such failure may be overlooked by the appellate court when the error is deemed fundamental, the court reasoned that failure to comply with the face-to-face requirement by allowing videotaped testimony of a child molestation victim outside of the physical presence of the defendant did not substantially impair his opportunity for the ascertainment of truth, and thus, failure to assert the right at trial precluded the claim of reversible error. *Id.* at 338.

8. 575 N.E.2d 642 (Ind. Ct. App. 1991).

9. *Id.* at 649.

10. 555 N.E.2d 505 (Ind. Ct. App. 1990).

11. *Id.* at 507.

12. *See Kuchel v. State*, 570 N.E.2d 910 (Ind. 1991).

13. IND. CONST. art. I, § 16.

14. *Id.* § 18.

has a right to have the proportionality of his penalty reviewed under the Indiana Constitution because it is possible that application of an otherwise constitutional statute may be invalid as applied in a particular instance. In *Clark v. State*,¹⁵ the Supreme Court of Indiana explained that section 16 is violated when a prison term is deemed "so severe and so entirely out of proportion to the gravity of the offenses actually committed as 'to shock public sentiment and violate the judgment of a reasonable people.'"¹⁶ In that case the court found that the enhancement of a sentence to thirty-five years under the habitual felony offender law, which was triggered by a conviction for conduct that the legislature classified as a misdemeanor, was entirely out of proportion to the gravity of the offense.¹⁷ Similarly, in *Best v. State*,¹⁸ the court held that although the defendant, convicted of driving while intoxicated and while his driving privileges were suspended, had a history of prior, more serious convictions, "[g]iven the modest nature of the present offense . . . it was manifestly unreasonable to add twenty years" — the Indiana Constitution would allow at most a ten year enhancement.¹⁹ Finally, in *May v. State*,²⁰ the court ruled that a judge must evaluate the probation officer's sentencing report and not merely adopt a suggested sentence. This is necessary to insure that no vindictiveness, contrary to the constitutional guarantee prohibiting "vindictive justice," has occurred in sentencing.²¹

Outside the criminal law area, litigation under the Indiana Constitution has been rather sparse. In several cases, the Indiana Court of Appeals noted that parallel Indiana constitutional provisions should be interpreted in tandem with their federal constitutional counterparts.²²

15. 561 N.E.2d 759 (Ind. 1990).

16. *Id.* at 765.

17. *Id.* at 766. The defendant was convicted of operating a motor vehicle while intoxicated, which normally carries a one year term, and for driving with a suspended license.

18. 566 N.E.2d 1027 (Ind. 1991).

19. *Id.* at 1032. *Cf.* *Nettles v. State*, 565 N.E.2d 1064 (Ind. 1991) (imposition of two 60-year sentences to be served consecutively was proportional in light of the mutilation murder of a five-year-old and her mother); *Wolfe v. State*, 562 N.E.2d 414 (Ind. 1990) (281-year sentence was not excessive under either U.S. or Indiana Constitutions).

20. 578 N.E.2d 716 (Ind. Ct. App. 1991).

21. *Id.* at 724.

22. *See, e.g., Fordyce v. State*, 569 N.E.2d 357 (Ind. Ct. App. 1991) (obscenity is no more protected speech under article I, § 9 of the Indiana Constitution than it is under the U.S. Constitution); *Vanderburgh County Bd. of Comm'rs v. Rittenhouse*, 575 N.E.2d 663 (Ind. Ct. App. 1991) (article I, § 21's guarantee of a right to just compensation triggers the same deferential approach as under the federal constitution;

In a few cases, however, Indiana courts have pointed to the state constitution as providing an independent source of rights. Thus, in *Center Township v. Coe*,²³ the court invoked article I, section 4, which provides that "no person shall be compelled to attend . . . any place of worship . . . against his consent,"²⁴ and section 6, which prohibits the expenditure of state dollars "for the benefit of any religious or theological institution," to invalidate a township trustee's practice of providing emergency shelter for the homeless through the use of religious missions.²⁵ Although suggesting that the use of shelters owned and operated by religious institutions is not per se invalid, the court noted that attendance at religious services was made a condition of receiving given shelter, and thus, violated both federal and state constitutions.²⁶

In another case, *In re Lawrance*,²⁷ the Supreme Court of Indiana addressed whether Indiana law permits family members of an incompetent patient in a persistent vegetative state to authorize withdrawal of artificial nutrition and hydration without first seeking court authority to do so. In exploring Indiana's common law on this issue, the court invoked article I, section 1 of the Indiana Constitution which guarantees "inalienable rights" including "life, liberty, and the pursuit of happiness."²⁸ Citing the 1850 constitutional debates, the court noted the drafters' belief that liberty includes "the opportunity to manage one's own life except in those areas yielded up to the body politic."²⁹ Although this section was cited merely to buttress its interpretation of Indiana's Health Care Consent Act to operate without court intervention when

thus, plaintiffs must rebut a presumption of constitutionality and all reasonable use of property must be denied in order to find a taking); *Metro Holding Co. v. Mitchell*, 571 N.E.2d 580 (Ind. Ct. App. 1991) (neither the contract clause of the state or federal constitution is violated by reduction, from two years to one year, of the period of redemption after a tax sale because the period of redemption did not create a contract between the taxpayer and the state).

23. 572 N.E.2d 1350 (Ind. Ct. App. 1991).

24. *Id.* at 1353.

25. *Id.* at 1360.

26. *Id.* The court observed that the trustee made no effort "to separate the missions' sectarian purpose from the statutory benefit," and thus the article I, § 6 prohibition against payment of public funds to religious missions to be used for religious purposes was violated. *Id.*

27. 579 N.E.2d 32 (Ind. 1991).

28. *Id.* at 36. Article I, § 1 provides in pertinent part: "That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the People; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being." IND. CONST. art. I, § 1.

29. *Lawrance*, 579 N.E.2d at 39.

none of the interested parties disagree, the supreme court's invocation and analysis of article I, section 1 suggests that this provision may be used in the future to protect the right to die or, more broadly, a right of privacy.³⁰

In at least two recent cases, the Indiana Constitution provided the focal point in the court's analysis. In *Kellogg v. City of Gary*,³¹ the Supreme Court of Indiana held that article I, section 32 creates a guaranteed right on behalf of Indiana citizens to bear arms for their own self-defense and for the defense of the state.³² This finding was critical in establishing a property and a liberty interest triggering the Fourteenth Amendment due process protection of the federal Constitution.³³ The court held that although the right to bear arms is subject to regulation, and in fact, the Indiana Firearms Act imposes limitations on the substantive right to carry weapons, there is nonetheless a state-created right to carry a handgun provided the requirements of state law are met.³⁴ Thus, a mayor's decision to suspend all future handgun applications deprived Indiana citizens of a "federally protected, state created, substantive right to carry a handgun with a license."³⁵

In its most extensive constitutional analysis, the Supreme Court of Indiana, in *Bayh v. Sonnenburg*,³⁶ explored the meaning of article I, section 21, which guarantees that "[n]o person's particular services shall be demanded, without just compensation."³⁷ A group of former mental patients sought compensation under this provision for work performed while they were committed to state mental hospitals. Plaintiffs were required to work full-time jobs as kitchen workers, grounds keepers, barbers, maintenance workers, secretaries, launderers, mechanics, hospital workers, and janitors. Although the Indiana Court of Appeals disallowed prejudgment interest, which cut the trial court's

30. Note that the lower court judge specifically ruled that "the liberty interest of the individual, as set forth in Article I, Sec. 1 of the Indiana Constitution, does include the right of Sue Ann Lawrance to be free from unwanted medical treatment and that said Article further requires the State to give effect to the decision of Sue Ann's surrogate decisionmakers." *Id.* at 36.

31. 562 N.E.2d 685 (Ind. 1990).

32. *Id.* at 694. Article I, § 32 provides, "The people shall have a right to bear arms, for the defense of themselves and the State." IND. CONST. art. I, § 32.

33. The court reasoned that "the framers of the Indiana Constitution gave the citizens of this state the 'extra' liberty or property interest in bearing arms for their own self defense and for the defense of their state which the Due Process Clause of the Fourteenth Amendment will protect." *Kellogg*, 562 N.E.2d at 695.

34. *Id.* at 695-98.

35. *Id.* at 702.

36. 573 N.E.2d 398 (Ind. 1991), *cert. denied*, 60 U.S.L.W. 3481 (U.S. Feb. 24, 1992).

37. IND. CONST. art. I, § 21.

judgment in half to about \$14 million, it found that the plaintiffs were entitled to just compensation under article I, section 21.³⁸ The Indiana Supreme Court reversed this judgment, finding that: (1) the term "particular services" could not be applied to labor performed by mental patients because section 21 was not intended to invalidate historical practices such as the use of patient labor without paying wages and because patient work was "general" and not "particular" services;³⁹ (2) the work requirement was reasonably related to the patients' hospitalization;⁴⁰ and (3) even if a taking could be found, just compensation was received by the patients in the form of benefits, such as food, shelter, and care, which exceeded the value of the services demanded.⁴¹

In reaching its holding, the court noted that its task in interpreting the Indiana Constitution was to "search for the common understanding of both those who framed it and those who ratified it."⁴² The court cited an 1871 decision of its predecessors, admonishing courts to "look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted."⁴³ Applying this historical approach, the court reasoned that in choosing the phrase "particular services" the delegates to the 1850-1851 Indiana constitutional convention did not intend "to create new rights to compensation for services provided to the State that had gone historically uncompensated."⁴⁴ Although noting that unconstitutional acts do not become constitutional through age or repetition, the specific history suggesting that the framers intended to preserve the "particular services" clause from the earlier constitution as a reaffirmation of historical practice, disallowed payment in this context.⁴⁵ The court's emphasis on history suggests the significance of re-examining the report of the debates and proceedings of the 1850 convention as a means of rejuvenating and providing substance to Indiana's Bill of Rights.⁴⁶

38. *Sonnenberg*, 573 N.E.2d at 401.

39. *Id.* at 412-16.

40. *Id.* at 416-17.

41. *Id.* at 418-21.

42. *Id.* at 412.

43. *Id.* (citing *State v. Gibson*, 36 Ind. 389, 391 (1871)).

44. *Id.* at 413. Compare Justice Dickson's dissenting opinion citing to an 1854 decision requiring compensation to be paid to attorneys assigned by courts to represent poor persons as evidence that § 21 did create a right to compensation for services even if such services had gone "historically uncompensated." *Id.* at 425 (Dickson, J., dissenting). Justice Dickson also rejects the majority's focus on extrinsic benefits received by the patients, relying on case precedent to suggest that absent a legislative determination, "extrinsic benefits are not a necessary constitutional component of 'just compensation.'" *Id.* at 426.

45. *Id.* at 415.

46. See DEBATES IN INDIANA CONVENTION (1850).

II. RECENT DEVELOPMENTS UNDER THE FEDERAL CONSTITUTION

A. *Freedom of Expression: Nude Dancers, Attorneys, and Government Employees*

In *Barnes v. Glen Theatre, Inc.*,⁴⁷ the United States Supreme Court held that Indiana's public indecency statute⁴⁸ could be constitutionally applied to prohibit non-obscene nude dancing.⁴⁹ The Seventh Circuit, in a seven to four en banc ruling, held that (1) non-obscene nude dancing performed as entertainment is expression and thus entitled to First Amendment protection⁵⁰ and (2) that Indiana's public indecency statute, which provides for a total ban on nudity in public places, is unconstitutional as applied to prohibit such dancing.⁵¹ Although eight members of the Court agreed with the Seventh Circuit's first decision, the Justices in a five to four ruling overturned the second holding.⁵²

As to the first ruling, eight Justices agreed that nude dancing is entitled to First Amendment protection. Even the conservative members of the Court conceded that nude dancing "is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so."⁵³ Only Justice Scalia rejected First Amendment coverage. He found that because Indiana's public nudity statute is a general law regulating conduct, and is not specifically directed at expression, it is not subject to First Amendment scrutiny.⁵⁴ He stated

47. 111 S. Ct. 2456 (1991).

48. IND. CODE § 35-45-4-1(a)(3) (1988) makes public indecency, including appearing nude in public, a crime. Nudity is defined in the statute as:

the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernible turgid state.

Id. § 35-45-4-1(b).

The Supreme Court of Indiana, in *State v. Baysinger*, 397 N.E.2d 580 (Ind. 1979), *cert. denied sub nom.* *Clark v. Indiana*, 446 U.S. 931 (1980), interpreted the statute to apply to nude entertainment in theaters, nightclubs, and other establishments open to the public, although it carved out an exception for performances having an expressive character.

49. *Barnes*, 111 S. Ct. at 2463.

50. *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990), *rev'd on other grounds sub nom.* *Barnes v. Glen Theatre*, 111 S. Ct. 2456 (1991).

51. *Id.* at 1089.

52. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).

53. *Id.* at 2460.

54. *Id.* at 2465 (Scalia, J., concurring). This was the position urged by Judge Easterbrook below. *Miller*, 904 F.2d at 1121-22 ("a law proscribing conduct for a reason having nothing to do with its communicative character need only meet the ordinary minimal requirements of the equal protection clause").

that the First Amendment does not protect expressive conduct, and thus, the government need not show an important interest to preclude such conduct. He reasoned that it is only when the government prohibits conduct because of its communicative attributes — when the target of the statute is to suppress the idea being communicated — that First Amendment concerns become relevant.⁵⁵

By accepting the communicative value of nude dancing, the Court was forced to determine whether the Indiana statute was an impermissible infringement of that protected activity. Here, although five Justices sustained application of the Indiana nudity law, it took three diverse opinions to reach a consensus. As stated earlier, Justice Scalia withheld First Amendment protection entirely from nude dancing.⁵⁶ Three other members of the Court, in an opinion authored by Chief Justice Rehnquist, held that government interference with nude dancing would have to meet heightened scrutiny.⁵⁷ Applying the standard set forth in *United States v. O'Brien*,⁵⁸ which is used to assess the government's power to limit expressive conduct, they concluded that the moral disapproval of the people of Indiana was a sufficiently important government interest to sustain the indecency ban found in Indiana statutes since 1831.⁵⁹ The plurality reasoned that this interest was unrelated to the suppression of free expression because it barred nudity whether or not accompanied by expressive activity.⁶⁰ When Indiana applied its statute to nude dancing in nightclubs and theaters, it was not proscribing nudity because of the erotic message conveyed by the dancers, nor was it suppressing the message by requiring that dancers wear pasties and G-strings — “it simply makes the message slightly

55. *Barnes*, 111 S. Ct. at 2466-67. Justice Scalia analogized to the Court's approach with regard to the free exercise clause in which it was held that general laws not specifically targeted at religious practices do not require heightened First Amendment scrutiny even though such laws “diminished some people's ability to practice their religion.” *Id.* at 2467. Note that the same analysis was applied this term by Justice White in *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991), which held that the First Amendment does not prohibit a source from recovering damages under promissory estoppel law for a publisher's breach of a promise of confidentiality given in exchange for information. Because this was only a law of general application, it did not offend the First Amendment nor trigger strict review simply because its enforcement against the press had incidental effects on the ability to gather and report the news.

56. *Cohen*, 111 S. Ct. at 2463-71.

57. *Id.* at 2458-63.

58. 391 U.S. 367 (1968). *See also* *Webb v. State*, 575 N.E.2d 1066 (Ind. Ct. App. 1991) (state prostitution law proscribing autoerotic deviate sexual conduct engaged in for money is justified under *O'Brien* analysis despite regulation's incidental limitation on the expressive part of the activity).

59. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. at 2456 (1991).

60. *Id.* at 2463.

less graphic.”⁶¹ In short, the perceived evil that Indiana sought to address was not erotic dancing, but merely public nudity.

The most controversial aspect of the plurality’s reasoning is its conclusion that Indiana’s concerns are unrelated to speech.⁶² Arguably, it is the communicative impact of nude dancing, the “anti-moral message” being conveyed, that is the real object of the law. Justice Souter, concurring only in the judgment, tried to avoid this problem by stating that Indiana’s primary concern was not in banning the message, but in seeking merely to halt the secondary effects of nude dancing — namely, increased prostitution and other criminal sexual activity.⁶³ Conceding that such concerns were not voiced by the Indiana Legislature, Justice Souter concluded nonetheless that such interests could be assumed and are sufficient under *O’Brien* to justify enforcement of the nudity law in this context.⁶⁴ Because the state interest is triggered by the nudity and not the expressive component of the dance, Justice Souter found that the state had met its burden of articulating an interest unrelated to the suppression of free expression.⁶⁵ He disagreed, however, that “preserving morality” constitutes a sufficiently important state interest to justify the incidental effect on expression, choosing instead to focus on the “secondary effects” concerns of the state to meet the *O’Brien* test.⁶⁶

Four dissenters found the state’s bar to be a content-based restriction on speech, triggering strict scrutiny. Distinguishing the draft card destruction law in *O’Brien*, the dissent argued that the Indiana statute was not a general prohibition; rather, the key purpose of the proscription is “to protect viewers from what the State believes is a harmful message” communicated by nude dancing.⁶⁷ Because the emotional or erotic impact of dance is intensified by the nudity of the performers, the state is seeking to prohibit expression, and, even assuming that the state’s interests are important, the law is not narrowly tailored.⁶⁸ If, as Justice Souter argued, the concern was with prostitution or other criminal acts, it could criminalize such acts. The state could prohibit nude dancing in barrooms pursuant to the Twenty-First Amendment, and it could require that performances occur at a certain minimum distance from spectators, that they be limited to certain hours, or that

61. *Id.*

62. *Id.* at 2452.

63. *Id.* at 2469 (Souter, J., concurring).

64. *Id.* at 2470.

65. *Id.* at 2470-71.

66. *Id.* at 2468-69.

67. *Id.* at 2473 (White, J., dissenting).

68. *Id.* at 2474-75.

they occur in certain parts of the city. It is the flat ban that triggered the dissent's objection.⁶⁹

The Supreme Court's holding and analysis in *Barnes* are not surprising. The four different positions adopted by the various Justices were all discussed by members of the en banc panel of the Seventh Circuit.⁷⁰ Although the current Court is not so bold as to deny the communicative element in expressive conduct such as nude dancing, in a series of cases it has employed the *O'Brien* analysis to sustain government regulation of expressive conduct by finding purported substantial government interests unrelated to the suppression of ideas that outweigh the expressive element of the activity. Without openly relegating sexually explicit material to a lower standard of review, as some Justices have suggested,⁷¹ the Court has achieved the same result by justifying restrictions on this speech based on a generalized concern for public morality or "secondary effects" unsubstantiated in the record. The key point of dissention between the majority and dissenting Justices is on the question of the state's purpose for the regulation. If the purpose of applying Indiana's nudity statute to the plaintiff's expressive conduct was in reality to suppress the ideas being communicated, the regulation would have been subjected to strict scrutiny. Indiana would have been required to show a compelling interest and that the regulation was no more restrictive than necessary — a standard which the en banc panel believed the state failed to meet.⁷² By focusing on the nudity law, rather than the expressive dancing, five Justices overcame this hurdle.

69. *Id.* at 2475.

70. See Rosalie B. Levinson, *Nude Dancing and Political Speech as Protected Expression*, 24 IND. L. REV. 697, 698-705 (1991).

71. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 258 (1990) (Scalia, J., dissenting) (establishments that exhibit public nudity are engaged in the business of pandering and the Constitution should not foreclose a state or city from prohibiting businesses that "intentionally specializ[e] in . . . live human nudity"); *FCC v. Pacifica Found.*, 438 U.S. 726, 743 (1978) (although FCC regulation prescribing broadcast of "indecent" material is overbroad because provision will affect only references to sexual activity, i.e., references that lie at the periphery of the First Amendment, the regulation should be sustained; the overbreadth doctrine should not be used to "preserve the vigor of patently offensive sexual and excretory speech"). Cf. *id.* at 761 (Powell, J., concurring) ("I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection."). Justice Brennan has similarly noted "the Court's refusal to create a sliding scale of First Amendment protection calibrated to this Court's perception of the worth of a communication's content." *Id.* at 763 (Brennan, J., dissenting).

72. *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1089 (7th Cir. 1992), *rev'd on other grounds sub nom. Barnes v. Glen Theatre*, 111 S. Ct. 2456 (1991).

Perhaps the most far-reaching aspect of *Barnes* is Justice Rehnquist's holding that the state's interest in imposing its moral views on society justified the interference with expressive conduct. Justice Scalia points out that previous Supreme Court decisions relied on "concerns of decency and morality" to provide a rational basis for government regulation, but that these concerns had never been characterized as particularly "important or substantial."⁷³ Similarly, Justice Souter obviously felt uncomfortable resting his concurrence on the state's generalized interest in promoting morality and instead chose to rely upon "the State's substantial interest in combating the secondary effects of adult entertainment establishments."⁷⁴ Because the "morality" argument was espoused by only three Justices, its precedential value remains unclear. What is clear is that a growing body of the Court stands ready to sustain greater governmental regulation on expressive conduct, especially when such conduct does not implicate core political speech.

In two cases decided last term, the Supreme Court dealt with government regulation and punishment of "pure speech." In both, the Supreme Court sustained the government restrictions by focusing on the special status of the speaker. In *Gentile v. State Bar of Nevada*,⁷⁵ the Court applied the accepted principle that lawyers have less protection than the general public or the media in commenting publicly on their own pending cases. Whereas a contempt citation for obstructing justice can be leveled against the press only upon a showing of a clear and present danger that fair trial rights might be jeopardized, the Court upheld the validity of Nevada Supreme Court Rule 177 which bars attorneys' statements to the press that have "a substantial likelihood of materially prejudicing an adjudicative proceeding."⁷⁶ The Nevada rule tracks ABA Model Rule of Professional Conduct 3.6 which is in effect in thirty-one other states, including Indiana.⁷⁷ The majority found that the lesser "substantial likelihood," rather than the more stringent "clear and present danger of actual prejudice" standard, is appropriately applied to lawyers who have long been subject to regulation as "key participants in the criminal justice system."⁷⁸

73. *Barnes v. Glen Theatre, Inc.*, 111 S.Ct. 2456, 2467 (1991) (Scalia, J., concurring).

74. *Id.* at 2468-69 (Souter, J., concurring).

75. 111 S. Ct. 2720 (1991).

76. *Id.* at 2723. The rule prohibits an attorney from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if a lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." *Id.*

77. IND. RULES OF PROFESSIONAL CONDUCT § 3.6 (1987).

78. *Gentile*, 111 S. Ct. at 2744.

In addition to the lengthy history of control over attorneys' speech, the Court noted the unique threat that lawyers' comments pose to the fairness of a pending proceeding because of their special access to information through discovery and client communications.⁷⁹ Although recognizing that the claim involved "pure speech in the political forum" which lies at the core of First Amendment doctrine, because the speech rights of attorneys collide with the fundamental right to a fair trial by impartial jurors, the state struck the appropriate balance. The majority held that the restraint on speech was narrowly tailored, being limited to speech that is "substantially likely to have a materially prejudicial effect, it [was] neutral as to points of views . . . and it merely postponed the attorney's comments until after trial."⁸⁰

The holding in *Gentile* was not surprising, and in fact, even the dissenters found that there was nothing per se wrong with the substantial likelihood test because the drafters of the Model Rule apparently thought that the test approximated the clear and present danger standard.⁸¹ The dissent's concern, however, was that the record failed to support the Court's finding that Gentile's speech created a substantial likelihood of materially prejudicing the proceedings because none of the comments included evidence which would have been inadmissible at trial and the attorney was merely trying to counteract some of the adverse publicity regarding his client.⁸² In any event, a different majority of five Justices concluded that the Nevada Rule, as interpreted by its supreme court, was void for vagueness because it included a "safe harbor" provision allowing attorneys to "state without elaboration . . . the general nature of the . . . defense."⁸³ The rule failed to provide fair notice to attorneys as to what may be said at a press conference without fear of discipline and was so imprecise that it created a real possibility for discriminatory enforcement.⁸⁴

79. *Id.* at 2745.

80. *Id.*

81. *Id.* at 2725.

82. *Id.* at 2726-31 (Kennedy, J., dissenting). At a press conference six months before trial, the attorney charged that his client was being used as a "scapegoat" for a theft that had most likely been committed by a police officer. He also charged that the state witnesses were known drug dealers and convicted money launderers.

83. *Id.* at 2731. The rule listed a number of statements that could be made without fear of discipline.

84. *Id.* at 2731-32. The rule suggested that a lawyer describing the "general nature" of the defense without "elaboration" need not fear discipline even if he knows or reasonably should know that his statement will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Because the terms "general" and "elaboration" are vague, the lawyer is left with little guidance as to when his remarks pass from the permissible to the forbidden. *Id.*

Much more controversial was the Supreme Court decision limiting the speech rights of employees in federally funded clinics. In *Rust v. Sullivan*,⁸⁵ the Court sustained the validity of Title X regulations which prohibit projects from engaging in counseling, referrals, and other activities which advocate abortion as a method of family planning.⁸⁶ The regulations further require that there be strict physical and fiscal separation between the federally funded activities of the family planning clinics and their privately funded activities, so that in essence, abortion cannot be spoken of in a neutral or favorable light anywhere on the federally funded site.⁸⁷ The regulations require recipients to say, if asked, that abortion is not an approved method of birth control. In addressing the government "employee speech" question, the Court reasoned that physicians and staff who are voluntarily employed by a Title X project can be required to perform their duties in accordance with the regulations' restrictions on abortion counseling and referral because Congress is merely refusing to fund such activities out of the public fisc.⁸⁸

The notion that government should have broad discretion in allocating funds, even if such discretionary allocation has an effect on the marketplace of ideas, clashes head-on with the competing constitutional theory that government cannot condition its largesse on relinquishing constitutional rights.⁸⁹ While recognizing the line of Supreme Court decisions which hold that the existence of a government "subsidy" does not justify all restrictions on speech, the Court nevertheless reasoned that in this context, the employees' freedom of expression was limited only during the time that the employees actually worked for the project and that this limitation was merely "a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority."⁹⁰ This conclusion conflicts with earlier Supreme Court decisions protecting the speech of government employees regardless of whether such speech occurs on the

85. 111 S. Ct. 1759 (1991).

86. *Id.* at 1776.

87. *Id.* at 1765-66. The regulation required recipients to say, if asked, that abortion is not an approved method of birth control.

88. *Id.* at 1775.

89. Compare *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983) (while there is a right to lobby, there is no right to a government subsidy for lobbying activities and thus government may, subject to only minimal rationality review, deny a subsidy to lobbying groups) with *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (government cannot condition federal funds to public television stations on their relinquishing the right to editorialize).

90. *Rust v. Sullivan*, 111 S. Ct. 1759, 1775 (1991).

premises. For example, in *Rankin v. McPherson*,⁹¹ the Supreme Court held that the employee's communication, which her employer sought to punish, was entitled to protection even though it occurred during business hours.⁹² Although recognizing that government employee speech which creates material disruption in the workplace is unprotected, the Court subjected the government action to heightened scrutiny, rather than the rationality standard which the majority imposed in *Rust*.⁹³

The use of a rationality standard in sustaining this restriction on speech is especially problematic because the restriction was both viewpoint discriminatory, and it involved speech regarding a fundamental right. The fact that the regulation allowed speech recommending childbirth while prohibiting the mention of abortion can hardly be characterized as a viewpoint neutral determination. Yet, the majority found that the regulations did not amount to viewpoint discrimination, but merely reflected the government's decision to selectively subsidize one activity, i.e., the activity of family planning and counseling, while refusing to subsidize other activities.⁹⁴ This characterization appears disingenuous at best. Moreover, the fact that the prohibition prevents physicians from giving patients information regarding their fundamental right to terminate a pregnancy is especially troublesome. Because the federal government in essence has a monopoly over the provision of medical services to the poor, the Court's ruling creates a "two-tier system of constitutional rights, one for the rich and one for the poor."⁹⁵

91. 483 U.S. 378 (1987).

92. *Id.* at 391.

93. *See id.* at 384. Although the "speech" was a rather inflammatory statement by a deputy constable following the attempted assassination of President Reagan, ("If they go for him again, I hope they get him"), the Court held that the remark "plainly dealt with a matter of public concern," and thus was protected absent evidence that it interfered "with the efficient functioning of the office." *But cf.* *Campbell v. Porter County Bd. of Comm'rs*, 565 N.E.2d 1164 (Ind. Ct. App. 1991) (because shift captains' grievance addressed internal administrative matters and not matters of public concern, their speech was not entitled to First Amendment protection); *Phegley v. Indiana Dep't of Highways*, 564 N.E.2d 291 (Ind. Ct. App. 1990) (where the record failed to disclose that plaintiff's conversation with party chairmen was "a matter of legitimate public concern about which free and open debate would be vital to informed decision-making by the electorate," the speech was entitled to little if any protection, and it did not gain protected status simply because the subject matter might be of general interest to the public). These cases follow the Supreme Court decision in *Connick v. Myers*, 461 U.S. 138 (1983), that only speech which is a matter of public concern triggers First Amendment protection.

94. *Rust*, 111 S. Ct. at 1772.

95. *See* 60 U.S.L.W. 2253 (Oct. 22, 1991) (Kathleen M. Sullivan, Comments at the Symposium of the U.S.L.W. Constitutional Law Conference). "Both the purpose and result of the challenged Regulations is to deny women the ability voluntarily to

Although on one level the decision may simply reflect the Supreme Court's growing hostility to the *Roe* decision, its fatuous discussion of viewpoint neutrality and its broad conferral of authority on government to regulate speech through the power of the purse strings portend potentially dire consequences for First Amendment jurisprudence.

In sharp contrast to the Court's failure to protect the free speech rights of those on the public payroll, the Supreme Court has been exceedingly protective of the free association rights of government employees. Last term in *Rutan v. Republican Party of Illinois*,⁹⁶ the Supreme Court held that the First Amendment protects not only employees who are dismissed based on political affiliation, but also those who are not hired or who lose a promotion, transfer, or other opportunity because of political affiliation.⁹⁷ Imposing a strict scrutiny standard, the Supreme Court held that there is no compelling government interest justifying any form of political patronage decisionmaking. The Supreme Court has clarified that the only exception to the patronage prohibition is when the employer is able to demonstrate that party affiliation is an appropriate requirement for the performance of the specific job in question.⁹⁸ In *Matlock v. Barnes*,⁹⁹ the Seventh Circuit held that the city of Gary failed to show how an investigator in the law department could constitutionally be terminated from his position due to his political affiliation.¹⁰⁰ The court reasoned that the investigator was not a policymaking or confidential employee because he had little authority, he did not supervise anyone, and he was supervised by other attorneys.¹⁰¹ There was no area regarding his duties where political affiliation would affect job performance.¹⁰²

Despite *Rutan*, the Seventh Circuit has refused to afford First Amendment protection to independent contractors who lose their gov-

decide their procreative destiny. For these women, the Government will have obliterated the freedom to choose as surely as if it had banned abortions outright." *Rust v. Sullivan*, 111 S. Ct. 1759, 1785 (1991) (Blackmun, J., dissenting).

96. 110 S. Ct. 2729 (1990).

97. *Id.* at 2730.

98. *Branti v. Finkel*, 445 U.S. 507 (1980).

99. 932 F.2d 658 (7th Cir.), *cert. denied*, 112 S. Ct. 304 (1991).

100. *Id.* at 665.

101. *Id.*

102. *Id.* at 662-65. See also *Upton v. Thompson*, 930 F.2d 1209, 1217 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1262 (1992) (noting that the Seventh Circuit has examined factors such as "'the specific position of power involved' the 'customary intimacy of association with the office' and the 'need for mutual trust and confidence'" in determining whether political affinity is an appropriate job requirement).

ernment contracts because of political affiliation. Prior to *Rutan*, the Seventh Circuit, as well as other appellate courts, ruled that the First Amendment does not protect independent contractors from adverse decisions based on partisan political reasons because the coerciveness associated with public employees carries diminished weight when an independent contractor simply loses one "customer" due to the patronage practice.¹⁰³ The argument is that an independent contractor normally would feel a lesser sense of dependency, and thus First Amendment rights are more attenuated and insufficient to justify tampering with political institutions.¹⁰⁴ To the extent that the Seventh Circuit's position on independent contractors relies on the argument that loss of one contract is not so significantly penalizing as to trigger constitutional protection, the Supreme Court's holding in *Rutan* would appear to require a critical re-evaluation. If loss of a transfer or promotion is considered a significant penalty triggering strict scrutiny, loss of a lucrative government contract should evoke the same analysis. This conclusion is buttressed by the earlier Supreme Court holding in *Lefkowitz v. Turley*,¹⁰⁵ invalidating a state statute which required public contractors to waive their Fifth Amendment immunity from self-incrimination in any proceeding relating to their government contract or face a five year ban on doing further business with the government.¹⁰⁶ The Court rejected the argument that there was "a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor."¹⁰⁷

Unpersuaded by this case precedent, the Seventh Circuit in a recent decision reaffirmed its position that independent contractors are not shielded from patronage practices. In *Downtown AutoParks, Inc. v. City of Milwaukee*,¹⁰⁸ the court conceded that "the scope of *Rutan*, and rationale behind it, seem to be at odds with the [earlier] hold-

103. *Triad Assocs., Inc. v. Chicago Housing Auth.*, 892 F.2d 583 (7th Cir. 1989), *cert. denied*, 111 S. Ct. 129 (1990). *See also* *Horn v. Kean*, 796 F.2d 668, 673-75 (3d Cir. 1986) (permitting those who hold public office to employ independent contractors based on political party affiliation provides an effective method to implement the administration's program that outweighs the lesser burden imposed when it is a contractor rather than a state employee whose rights are at stake); *Sweeney v. Bond*, 669 F.2d 542, 545 (8th Cir.), *cert. denied*, 459 U.S. 878 (1982) (politically motivated dismissal of Missouri Department of Revenue fee agents, classified as independent contractors, does not violate the First Amendment).

104. *Horn*, 796 F.2d at 674-75.

105. 414 U.S. 70 (1973).

106. *Id.* at 83.

107. *Id.*

108. 938 F.2d 705 (7th Cir.), *cert. denied*, 112 S. Ct. 640 (1991).

ing[s].”¹⁰⁹ *Rutan* rejected the Seventh Circuit’s concern that extending First Amendment protection beyond termination decisions would unnecessarily flood the federal courts with new patronage claims. Nevertheless, the appellate court decided to limit the Supreme Court case to its own facts, and therefore, it refused to extend First Amendment protection beyond the context of government employment.¹¹⁰ Because *Rutan* was a five-four decision, authored by Justice Brennan, his absence from the Court, coupled with that of Justice Marshall, arguably signals the end of the expansionist approach to providing First Amendment protection from political patronage practices, and thus, the Seventh Circuit’s position on independent contractors is likely to remain the law.¹¹¹

B. Freedom of Religion

Proceeding on the premise that the proper position of government is to maintain a position of neutrality vis-a-vis religion, the Supreme Court has interpreted the Establishment Clause of the First Amendment to require that all government programs share three characteristics: (1) the program must have a secular purpose; (2) the primary effect must neither advance nor inhibit religion; and (3) the program cannot create excessive entanglement between church and state.¹¹² This three-pronged analysis has been referred to as the *Lemon* test. Most of the cases alleging an Establishment Clause violation involve either the grant of public aid to religious institutions or the injection of religion into the public sector through prayer or the display of religious symbols by the government. Both types of cases were brought by Indiana litigants this past term.

In *Center Township v. Coe*,¹¹³ the Indiana Court of Appeals held that the township trustee could not utilize private religious mission shelters to provide emergency housing to the homeless because the religious entities required attendance at religious services as a condition of being given shelter.¹¹⁴ As noted earlier, the Indiana Court of Appeals relied primarily on two sections of Indiana’s Bill of Rights—article I,

109. *Id.* at 709.

110. *Id.* at 710. The Seventh Circuit noted that the Sixth Circuit in a post-*Rutan* case similarly refused to prohibit the government from considering political criteria in awarding public contracts. *Id.* at 709 (citing to *Lundblad v. Celeste*, 874 F.2d 1097, 1102 (6th Cir. 1989), *cert. denied*, 111 S. Ct. 2889 (1991)).

111. Justice Scalia, dissenting in *Rutan*, indeed predicted that the unmanageable flood of litigation that inevitably would be triggered by the new decision would lead the Court “to reconsider [its] intrusion into this entire field.” *Rutan v. Republican Party of Ill.*, 110 S. Ct. 2729, 2758-59 (Scalia, J., dissenting).

112. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

113. 572 N.E.2d 1350 (Ind. Ct. App. 1991).

114. *Id.* at 1360.

section 6, which prohibits the flow of tax dollars to religious institutions, and article I, section 4, which provides that no person shall be compelled to attend any place of worship against his consent.¹¹⁵ The court thereby avoided discussion of the federal Establishment Clause. In reaching its conclusion, however, the court also relied upon the federal free exercise law which dictates that government cannot condition receipt of a statutory benefit on mandatory attendance at religious services.¹¹⁶

As to cases involving the infiltration of religion into the public sector, the Supreme Court has been especially wary of allowing religious activity to take place in the public school setting because of the Court's concern that public school officials not give the impression of endorsing religion. Nonetheless, in *Berger v. Rensselaer Central School Corp.*,¹¹⁷ the District Court for the Northern District of Indiana ruled that the school corporation's policy of allowing the distribution of Gideon Bibles and other religious literature in classrooms does not violate the First Amendment.¹¹⁸ The facts indicated that the Gideons visited the school corporation annually and distributed Gideon Bibles to fifth graders during regular school hours after explaining who they were, what their organization stood for, and that the Bibles would be distributed free of charge. Although a teacher was present in the classroom, at no time did the teacher say anything or participate in handing out the Bibles. The practice dated back at least thirty-five years, and the Bibles were to be distributed only to fifth graders whose parents consented, although in recent years permission slips had not been used.

The court applied a modified *Lemon* test in reaching its decision that although difficult questions of constitutional law were raised by the school's practice, the regime under which the materials were made available to students did not violate the Establishment Clause.¹¹⁹ The modification stems from the Supreme Court's assertion in several recent cases that the most critical question in assessing claims brought under the Establishment Clause is whether the actual purpose of the government practice is to endorse religion and whether the government action is likely to be perceived as state endorsement of religion.¹²⁰ The district court reasoned that the purpose for allowing Bible distribution was not to endorse religion and that because of the large number of distributions made to students by various groups, it was unlikely that

115. See *supra* notes 23-26 and accompanying text.

116. *Cole*, 572 N.E.2d at 1360.

117. 766 F. Supp. 696 (N.D. Ind. 1991).

118. *Id.* at 707.

119. *Id.* at 704.

120. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

it would be perceived by an objective viewer as an endorsement of religion.¹²¹ In fact, the court reasoned that disallowing this practice would send a message of religious hostility to the students.¹²² Finally, the court found that neither the annual nature of the event, the fact that the principal was the special guest at a Gideon banquet for cooperating with its representative, nor the fact that the Bibles of objecting parents were to be returned to the children's teacher, created "excessive entanglement."¹²³ The court emphasized the teacher's non-involvement, the absence of any public funding, and the fact that this occurred only one time during each school year to support its conclusion that the involvement with religion was "merely incidental."¹²⁴

Although the Supreme Court in recent years has taken a much more accommodationist approach to Establishment Clause questions, it is difficult to reconcile the district court's conclusion with Supreme Court decisions involving religious activity in public schools. In *Board of Education of Westside Community Schools v. Mergens*,¹²⁵ the Court upheld the validity of the Equal Access Act which prohibits federally assisted, public secondary schools from discriminating against any group on the basis of religion when the school otherwise permits extracurricular student groups to meet on school premises.¹²⁶ *Mergens* sustained the right of student religious groups to utilize school facilities for the purpose of conducting prayer sessions, but the Court emphasized the fact that the religious speech was entirely student-initiated.¹²⁷ In sharp contrast, in *McCullum v. Board of Education*,¹²⁸ the Court held that permitting representatives to conduct religious school classes on school premises had the impermissible effect of advancing religion.¹²⁹ The Court stated, "This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment"¹³⁰ Other Supreme Court decisions have

121. *Berger*, 766 F. Supp. at 705-06 ("The defendant's policy offering school students exposure to the many facets of their local community (including the religious) does not constitute the school's imprimatur as to each such facet.").

122. *Id.* at 706.

123. *Id.*

124. *Id.* at 706-07.

125. 110 S. Ct. 2356 (1990).

126. *Id.* at 2373.

127. *Id.* ("a school that permits a student-initiated and student-led religious club to meet after school, just as it permits any other student group to do, does not convey a message of state approval or endorsement of the particular religion").

128. 333 U.S. 203 (1948) (per curiam).

129. *Id.* at 231.

130. *Id.* at 210.

similarly stressed that young students are impressionable and particularly susceptible to indoctrination by adults, that schools are tax-supported institutions, and that children find themselves captive audiences in these public institutions because of mandatory attendance laws.¹³¹

The district court's decision in *Berger* is currently on appeal to the Seventh Circuit. In determining how much interaction between church and state is permitted in the school context, the Seventh Circuit will perhaps be provided with some guidance by the Supreme Court, which has recently heard argument in the case of *Weisman v. Lee*.¹³² In *Weisman*, the Court has been asked to decide whether a benediction delivered by clergy at a public school ceremony has the impermissible effect of advancing religion. Both lower courts held that the practice violated all three prongs of the *Lemon* analysis, but amicus briefs filed by the Bush administration and others have urged the Court to abandon *Lemon* for a more accommodationist approach to the religion clause which would allow government interaction between church and state in the absence of government coercion regarding religious liberty.¹³³ Although the questions of school prayer and Bible distribution are not identical, in both cases third parties, whose sole function is religious, are being given the opportunity to deliver their sectarian message to public school students. On the other hand, in both cases the event occurs but once a school year and it involves no expenditure of public dollars, with only nominal participation by school officials. Thus, the analysis the Court adopts in *Lee* should prove to be instructive.

C. *Procedural and Substantive Due Process Claims*

The due process guarantee continues to be one of the most litigated constitutional provisions, as demonstrated by the large number of state

131. See *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 383 (1985) (invalidating two programs in which public school employees taught secular subjects to non-public school students based on the school's concern for the "sensitive relationship between government and religion in the education of our children"); *McCullum*, 333 U.S. at 227 (Frankfurter, J., concurring) ("[t]hat a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school . . . [t]he law of imitation operates, and non-conformity is not an outstanding characteristic of children").

132. 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991).

133. The coercion test was first formulated by Justice Kennedy in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), a case involving public display of religious symbols. Justice Kennedy stated that the government must directly compel someone to participate in a religious program, to make significant government expenditures, or to engage in "an exhortation to religiosity that amounts to proselytizing" of particular religious beliefs in order to find a violation of the establishment clause." *Id.* at 660. See also 60 U.S.L.W. 3351 (U.S. Nov. 12, 1991) (discussion of oral argument in the *Lee* case).

and lower federal court decisions that address both procedural and substantive due process issues.¹³⁴ Because the Due Process Clause protects only against deprivations of life, liberty, or property, analysis often begins by identifying a liberty or property interest. Federal, state, or local law, including contract or custom, dictates whether government has created a liberty or property interest.¹³⁵ This aspect of due process analysis triggered an extensive discussion in the case of *Kellogg v. City of Gary*.¹³⁶ In an effort to curb crime and violence on the streets, an agreement was reached between the mayor and the acting chief of police to no longer make applications for handguns available to the citizens of Gary. A group of city residents contended that this action deprived them of a liberty or property interest without due process. Although rejecting a Second Amendment claim because this guarantee has never been incorporated into the Fourteenth Amendment and made applicable to the states,¹³⁷ the court found that article I, section 32 of the Indiana Constitution, entitled "Bearing Arms," created a right to bear arms on behalf of Indiana citizens.¹³⁸ The court described the interest as one of liberty "to the extent that it enables law-abiding citizens to be free from the threat and danger of violent crime," as well as a property interest "at stake . . . in protecting one's valuables when transporting them."¹³⁹ Although recognizing that litigants cannot claim a liberty or property interest in the state's licensing *procedure* with regard to handguns, in this case Gary citizens were absolutely denied a handgun license application form, and thus a substantive right rooted in the state constitution was adversely affected.¹⁴⁰ The court concluded that "the framers of the Indiana Constitution gave the citizens of this state the 'extra' liberty or property interest in bearing arms for their own self defense and for the defense of their state which

134. Procedural due process dictates the manner in which the government may proceed when affecting an individual's legal interest or status, while substantive due process serves as a more general bar against arbitrary government action. *Daniels v. Williams*, 474 U.S. 327, 337 (1986).

135. See *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (a legitimate claim of entitlement is created and its dimensions defined "by existing rules or understandings that stem from an independent source such as state law"). See also *Woods v. City of Mich. City*, 940 F.2d 275, 281 (7th Cir. 1991) (a state creates a liberty interest by mandating the outcome to be reached upon a finding that relevant criteria have been met; thus, the court assumes without deciding that Ind. Code § 9-4-1-131(a) (1988) creates a liberty interest on behalf of an arrestee charged with a misdemeanor traffic offense to be released if not taken immediately before a judge).

136. 562 N.E.2d 685 (Ind. 1990).

137. *Id.* at 692.

138. *Id.* at 694.

139. *Id.*

140. *Id.* at 696-97.

the Due Process Clause of the Fourteenth Amendment will protect."¹⁴¹

Less successful have been procedural due process claims involving loss of employment. Most Indiana employees continue to be viewed as "at-will" workers whose jobs may be terminated without any procedural protection. Thus, in *Phegley v. Indiana Department of Highways*,¹⁴² the Indiana Court of Appeals held that professional engineers employed by the Department are "demotable for any reason or no reason whatsoever" because they have no property interest in further employment.¹⁴³ Similarly, in *Reed v. Shepard*,¹⁴⁴ the Seventh Circuit held that Reed was a civilian jailer whose employment was "at will" despite evidence that she was issued and wore a uniform of a sheriff's deputy and was given a copy of a rules and regulations manual that governed deputies, whose jobs were protected.¹⁴⁵ The court concluded that Reed's position as jailer was not intended to be equivalent to that of a deputy, and thus, she was not entitled to notice and a hearing prior to her termination.¹⁴⁶

The only federal constitutional recourse for at-will employees seeking procedural protection is through invocation of a "liberty" interest. The Supreme Court has held that if the government defames an individual in connection with a termination even from an at-will job, deprivation of a federally protected liberty interest in pursuing one's career may be implicated.¹⁴⁷ The Court in *Siebert v. Gilley*,¹⁴⁸ recently clarified that in order to avail oneself of this federal guarantee, a plaintiff must prove contemporaneous loss of current employment and damage to reputation by the government employer.¹⁴⁹ In *Siebert*, a federal employee voluntarily left his job, but was subsequently defamed in a "recommendation" letter that he requested from his former employer in order to secure a new position with the federal government. It was conceded that the letter led to his failure to be "credentialed" as a qualified psychologist and thus, seriously impaired his future

141. *Id.* at 695.

142. 564 N.E.2d 291 (Ind. Ct. App. 1990).

143. *Id.* at 295.

144. 939 F.2d 484 (7th Cir. 1991).

145. *Id.* at 488.

146. *Id.* at 489.

147. *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). *See also* *Speckman v. City of Indpls.*, 540 N.E.2d 1189, 1193-94 (Ind. 1989) (because at the time of Speckman's discharge, statements made to the press and others indicated that he had been dishonest or even criminal in handling city funds, the trial court erred in dismissing the claims without determining whether the alleged defamation was so slanderous as to prevent Speckman from continuing in the same occupation).

148. 111 S. Ct. 1789 (1991).

149. *Id.* at 1794.

employment prospects. Nonetheless, because "the alleged defamation was not uttered incident to the termination," the plaintiff failed to state an actionable "liberty" violation.¹⁵⁰

Once a protected liberty or property interest is identified, constitutionally required procedural safeguards are determined by balancing the following factors: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation through the procedures used and the probable value of additional procedural safeguards; and (3) the government's interest.¹⁵¹ Applying this standard in *Kellogg v. City of Gary*,¹⁵² the Indiana Supreme Court found that the private interests of Gary residents to be able to apply for and receive a handgun license in order to protect themselves were important enough to require additional safeguards.¹⁵³ Because termination of the application process was effectuated by executive decree without any hearing before the city council, which alone possessed legislative authority to pass ordinances for the benefit of the city, plaintiffs were deprived of their liberty and property without due process of law.¹⁵⁴

150. *Id.*

151. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). The Supreme Court's most recent application of *Mathews* is found in *Connecticut v. Doehr*, 111 S. Ct. 2105 (1991), which invalidated a state statute which authorized prejudgment attachment of real property upon plaintiff's *ex parte* assertion of probable cause, without a further showing of extraordinary circumstances. The Court reasoned that the interests affected were significant because attachment clouds title, impairs the ability to sell or otherwise alienate property, taints credit ratings, and may place an existing mortgage in technical default when there is an insecurity clause. Even though the property owner would not be deprived of complete physical or permanent use, the encumbrance was deemed sufficient to merit due process protection. Further, the Court reasoned that the risk of erroneous deprivation is great when a reviewing judge receives only a one-sided, self-serving, and conclusory affidavit, and the safeguards provided by the state, namely an expeditious post-attachment adversary hearing and double damages if the original suit was commenced without probable cause, did not adequately reduce the risk. Finally, the state interest was minimal because no allegations were made that the defendant was about to transfer or encumber the real estate. Note that Indiana's pre-judgment attachment statute is unaffected by *Doehr* because it permits attachment only in exigent circumstances. IND. CODE § 34-1-11-4.1 (1988). *Cf. Avco Fin. Servs. v. Metro Holding Co.*, 563 N.E.2d 1323 (Ind. Ct. App. 1990) (sustaining provisions of Indiana's tax sale statute which requires notice be given only to holders of a property interest recorded more than 60 days from the date of sale).

152. 562 N.E.2d 685 (Ind. 1990).

153. *Id.* at 702.

154. *Id.* *Cf. Smith v. Town of Eaton*, 910 F.2d 1469 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1587 (1991) (although an employee possessing a property interest in his job must be given notice and an opportunity to be heard prior to being subjected to final disciplinary action, the procedure need not be elaborate and can be satisfied with less than a full evidentiary hearing).

In addition to procedural due process, the Supreme Court continues to recognize that the Due Process Clause also contains a substantive component that bars certain arbitrary, wrongful government action regardless of the fairness of the procedures invoked.¹⁵⁵ However, when the government action does not affect so-called fundamental rights,¹⁵⁶ the Supreme Court has held that due process is not violated unless the government's action is totally arbitrary and capricious.¹⁵⁷ The deferential approach dictated by this standard is reflected in *Stewart v. Fort Wayne Community Schools*,¹⁵⁸ in which the Indiana Supreme Court held that although a school psychometrist had a property interest in her status as a tenured teacher, substantive due process was not violated when she was terminated while nontenured teachers were retained.¹⁵⁹ The court reasoned that the school board had a legitimate justification because the nontenured teachers who were retained had classroom teaching certificates and thus could perform dual roles for the school.¹⁶⁰ Although the 1983 employment policy rescinded the dual certification requirement explicit in the 1981 policy statement, the board's interest in retaining personnel with dual certification was not irrational.¹⁶¹

Despite this deferential approach to substantive due process, the Indiana Supreme Court in *Kellogg v. City of Gary* found that however noble the mayor's purpose in suspending the handgun license application process, his conduct arbitrarily deprived Gary residents of a right guaranteed them under the Indiana Constitution.¹⁶² The court emphasized that the mayor clearly exceeded his authority by suspending the application process through executive decree, bypassing the city council which was vested with legislative authority. The conduct "lacked a reasonable basis," and thus, plaintiffs proved a substantive due process violation.¹⁶³

155. *Zinerman v. Burch*, 110 S. Ct. 975, 983 (1990).

156. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing a fundamental right to marital privacy, which triggered the beginning of modern substantive due process analysis). This right to privacy has been extended to include the controversial right to terminate a pregnancy, *Roe v. Wade*, 410 U.S. 113 (1973), as well as the right to make basic familial decisions, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

157. *Zinerman*, 110 S. Ct. at 983. See also *Collins v. City of Harbor Heights*, 112 S. Ct. 1061, 1070 (1982) (city's alleged failure to train its employees or to warn them about known risks of harm was not "an omission that can properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense").

158. 564 N.E.2d 274 (Ind. 1990), cert. denied, 112 S. Ct. 169 (1991).

159. *Id.* at 279.

160. *Id.*

161. *Id.* at 280.

162. *Kellogg v. City of Gary*, 562 N.E.2d 685, 699 (1990).

163. *Id.* at 700.

The question of when, if ever, government abuse of power is sufficiently egregious to support a substantive due process claim has generated significant discussion and confusion in the lower courts. Some appellate courts have limited protection to individuals claiming violation of a federally protected liberty interest or to situations in which the state fails to provide a remedy for a state-created interest.¹⁶⁴ The Supreme Court last winter agreed to decide whether the arbitrary, capricious denial of a construction permit to a developer constitutes a substantive due process claim. In *PFZ Properties, Inc. v. Rodriguez*,¹⁶⁵ the First Circuit found that even if government officials engaged in delaying tactics and refused to issue a permit based on considerations outside the scope of their jurisdiction under state law, such conduct, without more, does not rise to the level of a violation of federal law.¹⁶⁶ The Supreme Court's determination of this issue would have been critical not only to land developers, but also to government employees and licensees whose jobs or licenses are terminated for arbitrary reasons, school children who are victims of unduly harsh, arbitrary corporal punishment, and pretrial detainees who have been subjected to arbitrary, capricious mistreatment or malicious prosecution.¹⁶⁷ The Supreme Court, however, recently dismissed the cert petition as having been improvidently granted.¹⁶⁸

164. Rosalie Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process*, 16 U. DAYTON L. REV. 313, 345-48 (1991). For recent cases debating the meaning of substantive due process, see *Santiago de Castro v. Morales Medina*, 943 F.2d 129, 130-31 (1st Cir. 1991) (substantive due process violation occurs only when the claim involves a specific property or liberty interest deeply rooted in fundamental principles or when conduct of government officials shocks the conscience; federal court should not become embroiled in workplace disputes when only state-created property interests are implicated); *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 683-85 (3rd Cir. 1991) (in challenging denial of a license as contrary to substantive due process guarantee, plaintiff must prove either that the city's licensing scheme was not rationally related to a legitimate government interest or that the city's action in denying the application based on community objection was improperly motivated; city's consideration of public sentiment that reflects legitimate concerns and has an adequate factual basis cannot be deemed per se arbitrary and irrational); *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 719-723 (4th Cir. 1991) (although circuits have adopted standards of care ranging from "gross negligence" to "deliberate indifference" to "recklessness" for substantive due process claims, in a case involving injury caused by policeman's operation of a vehicle while acting in the line of duty, the more stringent "shocks the conscience" standard should be utilized).

165. *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir.), cert. dismissed, 112 S. Ct. 1151 (1992).

166. *Id.* at 31-32.

167. Levinson, *supra* note 164 at 353-59.

168. *PFZ Properties*, 112 S. Ct. 1151 (1992).

The Supreme Court in recent years has imposed significant limitations on the reach of substantive due process by holding that claims of merely negligent deprivation of liberty or property are no longer actionable under the Due Process Clause¹⁶⁹ and by providing that in the absence of a "special custodial relationship," the Due Process Clause imposes no affirmative duty on the part of government to provide protective services.¹⁷⁰ In *Tittle v. Mahan*,¹⁷¹ the estate of a pretrial detainee who committed suicide in the county jail sued local officials, alleging violation of the deceased's constitutional rights. Although, in this context, the requisite custodial relationship existed so as to trigger due process rights,¹⁷² the court held that the plaintiffs failed to show how the government entity or its officials acted with "reckless disregard" or "reckless indifference" toward the detainee.¹⁷³ It reasoned that prison custodians cannot be guarantors of a prisoner's safety and that liability should not be imposed for a prison suicide unless the officers themselves take affirmative action directly leading to the suicide or prison officials actually knew or should have known of the suicidal tendencies of the prisoner and failed to take reasonable precautions to prevent the suicide.¹⁷⁴ Although the deceased had made a prior suicide attempt, the evidence was undisputed that jail officials were unaware of this information, and their failure to follow up on the deceased's psychological history was, at most, negligent.¹⁷⁵ Even if the jailers failed to monitor the deceased as often as required by their

169. *Daniels v. Williams*, 474 U.S. 327, 328 (1986) ("[w]e conclude that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property").

170. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998 (1989). The Court rejected a due process claim brought against a county welfare department for failing to intervene to protect a child against the arguably known risk of violence at his father's hands, reasoning that the "State's failure to protect . . . against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 1004.

171. 566 N.E.2d 1064 (Ind. Ct. App.), *aff'd in part*, 582 N.E.2d 796 (Ind. 1991).

172. *Id.* at 1069.

173. *Id.* at 1071-72.

174. *Id.* at 1069-70. *See also* *McGill v. Duckworth*, 944 F.2d 344, 349-50 (7th Cir. 1991) (inmate's claim against Indiana prison officials and prison guards that he was raped by a fellow inmate fails to state an Eighth Amendment claim absent evidence that jail officials had actual knowledge of impending harm easily preventable so that conscious, culpable refusal to prevent the harm could be inferred; ordinary negligence and even "gross negligence" is insufficient absent evidence that officials put inmate in segregation unit "because of, rather than in spite of, the risk to him"); *Salazar v. City of Chicago*, 940 F.2d 233, 241-42 (7th Cir. 1991) (neither police officers nor paramedics could be held liable for death of pretrial detainee who died after his arrest for D.W.I. following a traffic accident where there was no evidence that they exhibited deliberate indifference to the deceased's serious medical needs).

175. *Tittle*, 566 N.E.2d at 1071.

own guidelines, this failure also could not be characterized "as anything more than negligent."¹⁷⁶ To the contrary, the jail officials' concern about the detainee and his alcohol and drug problems led them "to place him in isolation, give him medication, and place him under periodic observation" — all of which negated a finding of deliberate indifference which is required to impose liability.¹⁷⁷

III. CONCLUSION

This past year, Indiana litigants presented state and federal courts with a host of novel federal and state constitutional claims. Several Indiana litigants, heeding the advice of Chief Justice Shepard, looked to the Indiana Constitution as a source for such significant civil liberties as the right to die, the right to religious liberty, the right to bear arms, the right to just compensation for services performed for the state, and as a source for several criminal procedural safeguards. In the federal realm, Indiana's nudity law became the focus of national attention as the United States Supreme Court assessed the expressive value of nude dancing, as well as the state's right to control this expressive conduct. Religious activities in public schools, patronage practices, and speech rights of government employees posed extremely difficult, controversial questions. Finally, while many due process claims were resolved under well-established legal doctrine, other cases challenged traditional doctrine and raised difficult questions regarding the

176. *Id.*

177. *Id.* at 1071-72. *See also* Colburn v. Upper Darby Township, 946 F.2d 1017 (3d Cir. 1991) (in order to impose liability on prison officials, likelihood that pretrial detainee will commit suicide must be so obvious that a layperson would easily recognize the necessity for preventive action; jail custodian's knowledge that detainee was intoxicated, had argued with her boyfriend, tried to ingest pills, and had a bullet in her pocket did not support an inference of custodian's deliberate indifference to detainee's welfare); Belcher v. Oliver, 898 F.2d 32 (4th Cir. 1990) (failure of officers to remove belt and shoelaces from detainee who committed suicide and failure to provide him with medical treatment for his psychological disorder does not rise to the level of deliberate indifference); Popham v. City of Talladega, 908 F.2d 1561 (11th Cir. 1990) (failure to prevent suicide does not constitute deliberate indifference where authorities had no knowledge of detainee's suicidal tendencies). *Cf.* Simmons v. City of Philadelphia, 947 F.2d 1042, 1074-75 (3d Cir. 1991) (evidence that statistical profiles of detainees likely to commit suicide were widely available and that police departments commonly trained officers responsible for detainees to recognize suicide tendencies and to take preventive measures supported jury's verdict that the need to train officers in suicide detention and prevention should have been apparent to city policymakers despite the extremely small number of suicides relative to the large number of intoxicated persons detained each year).

meaning and breadth of substantive due process as a guarantee against abuses of government power.

Update—Criminal Law & Procedure

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INTRODUCTION

The Supreme Court of the United States remained extremely active accepting and deciding criminal issues with constitutional dimension and, therefore, with implications for state criminal practice. The strong trend of these decisions is to strengthen law enforcement; constitutional protections are clearly contracting. Although the subject matter mix was refreshingly eclectic, the Fourth Amendment, confessions, habeas corpus, and the death penalty continued to occupy a large share of the Court's time. Surprisingly, the Confrontation Clause, the subject of much recent Court activity, was not addressed this past term. However, the Indiana Supreme Court issued important decisions in the confrontation area as well as in many others. Several significant statutory developments in the substantive crime area will also be discussed.

I. SUBSTANTIVE CRIMINAL LAW

A. Burglary

Both the Indiana courts and legislature were active in the burglary area. The cases continued to explore the question of when a building is a "dwelling," a circumstance that elevates burglary from a Class C felony to a Class B.¹ In *Ferrell v. State*² the supreme court held that

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1. The common-law formulation of burglary (and arson) embraced only dwellings. To break and enter a building other than a dwelling was simply not burglary, though it may have been some lesser offense. This was no mere quibble over semantics. The particular evil at which the crime of burglary was aimed was the intrusion into the sacred space of the habitation. It was not a property crime; it was the threat to personal safety and the sanctity of the habitation which was breached. "A person's home is his castle" fairly depicts the idea. A person's store, warehouse, or office were his property, to be sure, but not his castle. Slowly, especially in America, burglary was broadened to include all sorts of buildings and structures, sometimes even automobiles. Whether that development was even coherent is a question of some complexity, but there is no doubting that it happened and that Indiana has followed that development by broadening the subjects of burglary to include buildings and structures of all sorts. Recognizing the greater dangers and affront inherent in house intrusions, Indiana elevated a breaking and entry of a dwelling to a Class B felony. See IND. CODE § 35-43-2-1 (1988) (burglary); *id.* § 35-41-1-10 (definition of "dwelling").

2. 565 N.E.2d 1070 (Ind. 1991).

a building remained an occupant's³ "dwelling" even though he had not slept there for four months.⁴ The victim did maintain an address and phone at that location and visited the house on a regular basis. This was sufficient contact to treat the building as his dwelling. In *Brown v. State*,⁵ the victims physically relocated to another house, but maintained the right of occupancy and in fact, left personal items in the house. Again, this was held sufficient contact so that the building was still legally, if not factually, their "dwelling."⁶

In Indiana Code 35-43-2-1.5 the legislature created a new crime, Residential Entry: "A person who knowingly or intentionally breaks and enters the dwelling of another person commits residential entry, a Class D felony."⁷ This statute was prompted presumably by problems of proof in certain housebreaking scenarios. The Indiana Burglary Statute⁸ requires proof that the defendant entered with the intent to commit a felony. Often the state will have proof that the defendant broke and entered a house without consent, but the defendant takes the position either that he intended no target crime at all or that the target crime is a misdemeanor.⁹ The new statute permits prosecution for a felony (Class

3. Burglary has always been understood as a crime against the occupant, not the owner, because the theory of the harm was not property centered but privacy centered.

4. *Ferrell*, 565 N.E.2d at 1072.

5. 580 N.E.2d 329 (Ind. Ct. App. 1991).

6. *Id.* at 330. The "dwelling" cases all seem bizarre unless one first firmly fixes on the precise harm that the common law understood burglary to perpetrate. Any ordinary observer of the buildings in these cases would say, "This is a house. This is a dwelling." The common law had, however, no special interest in protecting one type of architecture (house) more than others (store, warehouse, etc.). They were all subject to property-centered crimes such as trespass, theft, or vandalism. The crime of burglary protected the special, human connection to the place one lived. Of course, threat to physical safety in housebreakings was often entailed, but this too was not the heart of the problem. Occupants out for the evening or on vacation were still understood to be subject to the special harm of outsiders intruding into their space. Indeed, psychologists are familiar with cases in which people can no longer live in their homes after they have been burglarized. What the recent dwelling cases in Indiana are really exploring is: "When does this special relationship with the habitational place start and when does it end?"

7. IND. CODE § 35-43-2-1.5 (Supp. 1991).

8. IND. CODE § 35-43-2-1 (1988).

9. Part of the problem here is theft, the most common target crime in burglary. Indiana Code § 35-43-4-2, the basic theft statute, has been interpreted to require an intent to deprive the owner of the property substantially permanently. *See, e.g., Nelson v. State*, 337 N.E.2d 877 (Ind. Ct. App. 1975). Thus, if the defendant claims that he intended to take the property temporarily (which, in some cases, is a plausible claim, especially with motor vehicles), there is no theft, but only criminal conversion, IND. CODE § 35-43-4-3 (1988), which is only a misdemeanor and thus, does not support burglary. If the prosecutor cannot prove an intent to commit theft, the state is left with two misdemeanors—criminal trespass, IND. CODE § 35-43-2-2 (Supp. 1991), and criminal conversion.

D) without any requirement of proof of intention to commit a target crime. Of course, if such intention is shown, the crime becomes a Class B burglary.¹⁰

B. Criminal Gangs

The legislature also enacted Indiana Code 35-45-9,¹¹ a series of provisions on criminal gangs, and amended the RICO statute¹² to incorporate gang activity. The subject of these provisions is a broad one. Any adequate treatment of the legal and constitutional implications of such changes is beyond the scope of this Article. Like RICO and "organized crime" statutes, the new legislation is an attempt to add enforcement weapons in fighting a problem which is proving intractable to solution by more conventional penal statutes. Clearly, the question of whether these provisions unduly offend First Amendment associational rights will have to be addressed.¹³

10. Note that the statute does not cover illegal breaking and entry of a building other than a dwelling. In such cases, intent to commit a felony will still be necessary to convict of Class C burglary. If such intent cannot be proved, the state will be left with a misdemeanor prosecution for criminal trespass. *Id.*

11. Indiana Code § 35-45-9 provides as follows:

Sec. 1. As used in this chapter, "criminal gang" means a group with at least five (5) members that specifically:

(1) either:

(A) promotes, sponsors, or assists in; or

(B) participates in; and

(2) requires as a condition of membership or continued membership; the commission of a felony or an act that would be a felony if committed by an adult or the offense of battery.

Sec. 2. As used in this chapter, "threatens" includes a communication made with the intent to harm a person or the person's property or any other person or the property of another person.

Sec. 3. A person who knowingly or intentionally actively participates in a criminal gang commits criminal gang activity, a Class D felony.

Sec. 4. A person who threatens another person because the other person:

(1) refuses to join a criminal gang; or

(2) has withdrawn from a criminal gang;

commits criminal gang intimidation, a Class C felony.

12. The criminal RICO statute is Indiana Code § 35-45-6-1, -2 (Supp. 1991). The civil RICO statute is Indiana Code § 34-4-30.5-1 to -4.5 (Supp. 1991).

13. There would be clear constitutional problems in making mere membership in a group a crime, especially if the group is multi-purposed, if some purposes were legal and if liability did not require proof of actual involvement in the illegal purposes. *See, e.g., Scales v. United States*, 367 U.S. 203 (1961). The criminal gangs statute seems to be drafted to avoid this difficulty insofar as possible. The question is whether, because it is so tightly drawn, anyone can ever be successfully prosecuted under it. It would seem, at least, to be difficult to obtain proof that a gang actually conditions membership on

II. ARREST, SEARCH, & SEIZURE

The most important Fourth Amendment decisions of the past term dealt with the parameters of the "seizure" of a person, a topic the United States Supreme Court had not addressed directly for several years. Both decisions clearly forward a law enforcement agenda.

In *California v. Hodari D.*¹⁴ and *Florida v. Bostick*,¹⁵ the Court dramatically changed the understanding of the initial phase of the police-suspect confrontation. Prior to *Hodari D.*, the principal question involving whether a suspect had been "seized" was whether an objectively reasonable person would "feel free to leave."¹⁶ This could be proved either by proof that the police physically restrained the suspect or engaged in shows of authority clearly signalling compulsion and not a voluntary conversation. The focus was on police conduct. *Hodari D.*, a seven to two decision, adds a new aspect, because now the "seizure" question depends, in part, on the suspect's reaction to the police. The police, concededly with neither probable cause nor reasonable suspicion, engaged in a chase of *Hodari D.* and others. There is no question that the police clearly signalled an intention to detain him without his voluntary consent. As he ran, he tossed away an object which later proved to be crack cocaine. The admissibility of that evidence was argued to be a "fruit of the poisonous tree" seizure. The Court held that *Hodari* had not yet been seized and redefined a seizure to mean (a) the application of physical restraint (a touching) or (b) a show of authority or force *to which the suspect yields*.¹⁷ Thus, until the suspect is caught or submits to the authority, no seizure has taken place. Thus, the abandonment of the cocaine was not the product of a seizure as none had yet taken place. The old definition of not feeling "free to leave" remains as a *necessary* aspect of this second type of seizure; it is, however, not *sufficient*. The dissent worried about the potential for abuse. Police may now engage in a "threatening, but sufficiently slow chase" to prompt various behaviors from suspects without needing any level of suspicion to do so.¹⁸

In *Bostick*, the suspect clearly submitted to the police; thus, the *Hodari D.* issue was not presented. Attention focused on the anterior

active participation in felonies. Groups such as this ordinarily do not have written charters. The purpose for the statute is understandable. The question is whether it successfully navigates between the Scylla of First Amendment difficulty and the Charibdis of requiring more proof than can be obtained.

14. 111 S. Ct. 1547 (1991).

15. 111 S. Ct. 2382 (1991).

16. See, e.g., *United States v. Mendenhall*, 446 U.S. 544 (1980).

17. *Hodari*, 111 S. Ct. at 1552.

18. *Id.* at 1559 (quoting 3 WAYNE LAFAVE, SEARCH AND SEIZURE § 9.2, at 61 (2d ed. 1987 & Supp. 1991)).

question: How much police behavior constitutes a sufficient show of authority so that the suspect does not objectively believe he is free to leave or ignore the police? Florida police were "working the buses," a procedure which entails boarding public buses during layovers and asking everyone (or some subgroup of people in some cases) to answer questions, present identification, and often, to consent to a search of their carry-on or stored luggage. Two uniformed, badged, armed police approached Bostick, positioned themselves in the aisle between Bostick and the door, and after preliminary questioning, asked him to consent to a search of his luggage. He did so and the search disclosed cocaine. Because he so clearly submitted to the police, the *Hodari D.* question was not presented. Rather, the court held that the police conduct was not a seizure because a reasonable person would not feel compelled to submit to such a request.¹⁹ The Court noted that any failure to cooperate could not be used as the basis for any probable cause or reasonable suspicion.²⁰ The dissent argued that the average traveler does not know this to be true and that the conduct of the police in this case was rife with compulsion.²¹ The case is complicated by the fact that bus travelers are not "free to leave" the bus in the same way that a suspect approached on the street is free to leave.

The combination of *Hodari D.* and *Bostick* presents a Hobson's choice to a suspect confronted by police who have no lawful right to arrest or stop him. *Bostick* requires great fortitude to withstand marginally coercive tactics, yet *Hodari D.* makes anything the suspect says or does not the product of a seizure and thus, usable against him to support further police inferences. The third choice is to submit "voluntarily" as did Bostick.

In *Florida v. Jimeno*,²² the Court held that consent to search a car includes consent to open any containers within the car in which the

19. *Id.* at 1557.

20. *Id.* at 1556-57.

21. *Florida v. Bostick*, 111 S. Ct. 2382, 2389 (1991) (Marshall, J., dissenting). The majority argues that any pressure against leaving is not of police origin. If a suspect does not mind missing his bus (a matter about which the police are presumably indifferent), he is "free to leave." The dissent points out that "working the buses" is a technique designed to exploit the very fact that the suspect has his own reasons for not exiting the situation. It seems that this debate is an illustration of the limitation of language. When the Court first penned "free to leave," it was dealing with situations in which the suspect was walking, driving, or otherwise going somewhere. To be free of the police contact was to "leave." Had the first case arose in the suspect's home, "free to leave" would hardly have been chosen. When the issue arises in situations like *Bostick*, when what the suspect wants is to "stay" and have the police "leave," one needs to get behind the words of a doctrine to its function. What if the police hounded a suspect sitting or lying in a hospital emergency room and claimed that he was, after all, free to leave?

22. 111 S. Ct. 1801 (1991).

sought item could be located.²³ Therefore, the defendant could not complain that following his consent to search his car for controlled substances, the police opened a brown paper bag which contained cocaine. The Court distinguished this situation from one in which the police, having received consent to search a car's trunk, pried open a locked briefcase in the trunk.²⁴ There, the Court reasoned that a policeman could not reasonably believe that the consenter meant to authorize such conduct.²⁵

*California v. Acevedo*²⁶ overrules *Arkansas v. Sanders*²⁷ and *United States v. Chadwick*,²⁸ wherein the so-called *Chadwick-Sanders* rule was developed. Police in *Acevedo* had probable cause that a paper bag being carried by a suspect contained controlled substances. The police waited until the suspect reached his car and placed the bag in the car, then detained the suspect, searched the bag, and found the evidence. Although it has long been true that automobile searches upon probable cause can be conducted without a warrant²⁹ and that such a search could extend to all containers within the vehicle,³⁰ the *Chadwick-Sanders* rule held that when probable cause was directed not to the car generally but to a particular container in a car, the police could not wait until that container was deposited in the car and then employ the automobile exception.³¹ The Court rejected *Chadwick-Sanders* as anomalous. The dissent noted that the potential for abuse was high because the police, had they seized the bag before it was put in the car, would have needed a warrant.³²

The case of *County of Riverside v. McLaughlin*³³ further elaborates on the requirement of *Gerstein v. Pugh*,³⁴ which held that an arrestee held without an arrest warrant is entitled to a prompt determination of probable cause.³⁵ *McLaughlin* progresses toward defining "prompt." The

23. *Id.* at 1804.

24. *Id.*

25. *Id.* (citing *State v. Wells*, 110 S. Ct. 554 (1990)).

26. 111 S. Ct. 1882 (1991).

27. 442 U.S. 753 (1979).

28. 433 U.S. 1 (1977).

29. *Carroll v. United States*, 267 U.S. 132 (1925).

30. *See United States v. Ross*, 456 U.S. 798 (1982).

31. The idea, of course, is that if the police could not search a container without a warrant when it was outside the car, the police should not be permitted to wait until it is placed in a car and then claim the exigency of the mobility of the vehicle to avoid the warrant requirement.

32. *California v. Acevedo*, 111 S. Ct. 1882, 1995 (1991) (Stevens, J., dissenting).

33. 111 S. Ct. 1661 (1991).

34. 420 U.S. 103 (1975).

35. *Id.* at 118.

Court held that this determination (which may be *ex parte*)³⁶ must occur "as soon as reasonably feasible, but in no event later than 48 hours after arrest."³⁷ The case resolved a division among the circuits, some of which had followed a forty-eight hour rule and some of which (including the Seventh Circuit) had required a prompter finding. The decision makes it absolutely clear that intervening weekends or holidays are insufficient reasons for not complying with the forty-eight hour rule, but other "extraordinary circumstances" might be.³⁸

As a practical matter, it should be noted that while many states combine the probable cause determination with other procedural events (arraignment, presentment, or bail hearing), nothing requires them to do so. Thus, in weekend or holiday situations when these other proceedings cannot occur within forty-eight hours, the Fourth Amendment is satisfied with a post-arrest warrant issued by a neutral magistrate following the same process as a pre-arrest warrant.

Indiana courts also devoted much of their time to Fourth Amendment issues. In *Smith v. State*,³⁹ the Indiana Supreme Court reviewed facts generating issues calling for refinement of the doctrine of a 1990 case, *Maryland v. Buie*.⁴⁰ *Buie* permitted, incidental to arrest in a house, a "protective sweep" of the house to protect police from incipient danger from accomplices, sympathizers, and others.⁴¹ The police in *Smith* made such a sweep and then entered a locked storeroom and found drying marijuana. The Indiana Supreme Court held that because there was no evidence that the room immediately adjoined the locus of arrest so that an attack on officers could be launched therefrom, and because no specific and articulable facts demonstrating any reasonable suspicion of danger existed, this entry did not fall within the *Buie* exception.⁴² Once the defendant is arrested and the immediate danger past, the police may

36. Applications for arrest warrants made prior to physical arrest have always, of course, been *ex parte*. *Gerstein*, as a Fourth Amendment case, never imposed anything more than a requirement of a warrant in cases in which the physical arrest was made without one as a condition precedent for holding the arrestee for any longer than was necessary for administrative processing. The *Gerstein* requirement, thus, should not be confused with other procedural requirements to prove probable cause at other stages of the formal judicial process. This confusion is prompted because many jurisdictions have chosen to satisfy the *Gerstein* requirement by amalgamating it with some other step in that process, such as presentment (preliminary arraignment).

37. *McLaughlin*, 111 S. Ct. at 1671.

38. *Id.*

39. 565 N.E.2d 1059 (Ind. 1991).

40. 494 U.S. 325 (1990).

41. *Id.* at 336.

42. *Smith*, 565 N.E.2d at 1063.

search, under the search-incident-to-arrest exception,⁴³ only within the rules of *Chimel v. California*.⁴⁴ Beyond the *Chimel* scope, police may only search further after obtaining a search warrant.

III. CONFESSIONS

The United States Supreme Court decided three cases involving confessions, two on the *Edwards* rule and one on coerced confessions. *Minnick v. Mississippi*⁴⁵ elaborated further on the much litigated *Edwards* rule. In *Edwards v. Arizona*,⁴⁶ the Court held that when a suspect during custodial interrogation invokes the right to consult with a lawyer, all questioning must cease and may not be reinitiated by the police until the suspect consults with an attorney.⁴⁷ The *Minnick* case addressed whether the prohibition of initiating interrogation continues even after a suspect has consulted with counsel. The Court held, 6-2, that it does.⁴⁸ *Edwards* protection requires that a suspect not be interrogated without counsel *present*. Thus, the intervening consultation does not toll the *Edwards* prohibition. Of course, if the suspect initiates the dialogue, the *Edwards* rule has been satisfied and the analysis follows traditional *Miranda* lines.⁴⁹

In *McNeil v. Wisconsin*,⁵⁰ the defendant was arrested for robbery. At arraignment, he requested a lawyer to represent him. Later, while still in custody, he was interrogated on an unrelated murder. The defendant had not invoked *Edwards*, which would have prevented police-initiated interrogation on any subject.⁵¹ However, he had requested Sixth

43. The police may have some basis for a warrantless search wholly apart from the search-incident-to-arrest theory on which *Buie* is based. For example, an occupant may consent to a search or the presence of others, who present no physical threat to the officers but who may destroy evidence, might give police the right to make a warrantless search provided they have probable cause of the presence of crime-connected items. See, e.g., *Vale v. Louisiana*, 399 U.S. 30 (1970).

44. 395 U.S. 752 (1969). *Chimel* permits a search of the arrestee's person and the area within his immediate control.

45. 111 S. Ct. 486 (1990).

46. 451 U.S. 477 (1981).

47. The invocation of a lawyer in *Edwards* must be kept distinct from the procedure which follows a suspect's invocation of silence. On invocation of silence, see *Michigan v. Mosley*, 423 U.S. 96 (1975).

48. *Minnier*, 111 S. Ct. at 492.

49. Under the Rehnquist Court, it is critically important to keep separate the Fifth Amendment *Miranda* line from the Sixth Amendment line of cases springing from *Massiah v. United States*, 377 U.S. 201 (1964). This court has interpreted *Miranda* grudgingly, but the *Massiah* line quite expansively.

50. 111 S. Ct. 2204 (1991).

51. See *Arizona v. Roberson*, 108 S. Ct. 2093 (1988).

Amendment counsel at his arraignment which the Court, in *Michigan v. Jackson*,⁵² seemed to treat as tantamount to an *Edwards* invocation. The *McNeil* Court held that *Jackson* did not control this case.⁵³ Whereas the *Edwards* invocation is not offense-specific, but terminates police-initiated interrogation on *any* subject, the *Jackson* rule, founded on the Sixth Amendment right to counsel (and not the Fifth Amendment counsel right as *Miranda-Edwards*), is "offense-specific" and thus does not bar police-initiated interrogation on subjects not the subject of the current prosecution.⁵⁴ Defense counsel should note that *McNeil* can be obviated easily (if counsel is present at the arraignment) by having the defendant make a clear *Edwards* invocation on the record.

The Indiana Court of Appeals decided another *Edwards* issue in *Rider v. State*.⁵⁵ A mother's statement to police, "We need an attorney," was urged by her twenty-year-old son to constitute an *Edwards* invocation for him as well, especially since her statement was made after consultation with him. The court held that only the defendant could invoke his *Edwards* right; therefore, his confession, given after full *Miranda* warnings and waiver, was admissible.⁵⁶

The United States Supreme Court's holding in *Arizona v. Fulminante*⁵⁷ is unremarkable, but the *dictum* is a striking reversal of precedent. The Court held that a confession was coerced and therefore, inadmissible.⁵⁸ Then, however, the Court overruled a long line of cases and held that a coerced confession could be harmless error under the doctrine of *Chapman v. California*.⁵⁹ This leaves a denial of counsel and a biased trial judge as the only two errors which cannot be harmless under *Chapman*. The Court distinguished these cases from coerced confessions by noting that they involve structural errors rather than "trial" errors.⁶⁰ Finally, the Court held that there was not proof beyond a reasonable doubt (the *Chapman* standard) that this particular error was harmless.⁶¹

52. 475 U.S. 625 (1986).

53. *McNeil*, 111 S. Ct. at 2209.

54. *Id.* at 2204.

55. 570 N.E.2d 1286 (Ind. Ct. App. 1991).

56. *Id.* at 1288.

57. 111 S. Ct. 1246 (1991).

58. *Id.* at 1252.

59. 386 U.S. 18 (1967).

60. *Fulminante*, 111 S. Ct. at 1251.

61. *Id.* at 1257. Given the devastating effect of a confession, ordinarily it will not be clear at all, much less clear beyond a reasonable doubt, that the jury's hearing of an inadmissible confession was harmless. The decision, important as it may be to harmless-error scholars, will probably have little practical impact. One has to imagine a case where the other evidence is so compelling (perhaps the defendant had the bad form to commit the crime on videotape) that the confession is clearly surplusage.

IV. JURY SELECTION

The Court decided two cases further developing the rule in *Batson v. Kentucky*.⁶² In *Powers v. Ohio*,⁶³ the Court addressed a question left open last term in *Holland v. Illinois*.⁶⁴ In *Holland*, the Court denied a Sixth Amendment claim of a white defendant that blacks had been peremptorily challenged by the prosecution in violation of *Batson*. In *Batson*, Justice Powell strongly intimated that had the case been argued as an equal protection case, the result would have been different.⁶⁵ Writing for a seven to two majority, Justice Kennedy made good on that promise (threat?) in *Powers*. The opinion notes that the equal protection interests of the jurors themselves (well beyond the idea in *Batson* that the *defendant's* equal protection rights were violated), are of constitutional dimension and that a white defendant has sufficient standing to raise those claims.⁶⁶ Thus, prosecutors must state race neutral reasons for peremptory challenges of racial minority jurors regardless of the race of the defendant.⁶⁷

As a counterpoint to *Powers*, the holding in *Hernandez v. New York*⁶⁸ indicates that the Court may be in a receptive mood to accept as "racially neutral" prosecutors' justifications for a *Batson* strike. Here, the prosecutor struck many Spanish speaking jurors (the defendant is variously described as Latino and Hispanic). The prosecutor explained that he was not confident that these potential jurors would accept as final the official court interpreter for Spanish speaking witnesses. The Court felt that this was sufficiently "race neutral" over a strong dissent from three justices.⁶⁹

V. BEYOND A REASONABLE DOUBT

In *Cage v. Louisiana*⁷⁰ the Court once again made clear that trial courts that embellish the meaning of "reasonable doubt" do so at great peril. In *Cape*, the trial court included within the standard "beyond a reasonable doubt" instructions: "It must be such doubt as would give rise to a grave uncertainty. . . . It is an actual, substantial doubt"; it

62. 476 U.S. 79 (1986).

63. 111 S. Ct. 1364 (1991).

64. 110 S. Ct. 803 (1990).

65. *Batson*, 476 U.S. at 100.

66. *Id.* at 91.

67. *Powers*, 111 S. Ct. at 1374. The *Powers* decision was acknowledged by the Indiana Supreme Court in *Holifield v. State*, 572 N.E.2d 490 (Ind. 1991).

68. 111 S. Ct. 1859 (1991).

69. *Id.* at 1873.

70. 111 S. Ct. 328 (1990).

amounts to a "moral, not a mathematical, certainty." The conviction was reversed *per curiam*.⁷¹

VI. RAPE-SHIELD STATUTES⁷²

In *Michigan v. Lucas*,⁷³ the Court held that a Michigan trial court properly precluded evidence of a past sexual relationship between the defendant and the prosecutrix because the defendant had not complied with the notice requirement of the Michigan statute⁷⁴ (which is quite similar to the Indiana statute⁷⁵ and to Federal Rule of Evidence 412).

VII. FAIR TRIAL

The decision in *Mu'Min v. Virginia*⁷⁶ reinforces the basic Burger Court direction in publicity cases staked out in *Murphy v. Florida*.⁷⁷ *Voir dire* examination disclosed that eight of the twelve jurors had heard of the case, which was highly publicized, but that they could be impartial. The judge did not inquire of those who had been exposed to publicity as to the content of what they had read or heard. The defendant claimed that his Sixth Amendment fair trial rights dictated that the judge probe content. The Supreme Court disagreed, holding that this was within the sound discretion of the trial court.⁷⁸ The jurors must agree to judge the case on the evidence, and the judge must be certain they will do so. However, this can be done without full disclosure by each prospective juror as to exactly what publicity has reached him or her.⁷⁹

VIII. PRESUMPTIONS

In *Yates v. Evatt*,⁸⁰ the Court struck down as unconstitutional an instruction allowing the jury to presume the necessary malice for murder from either the use of a deadly weapon or from the committing of any

71. *Id.* at 330.

72. The effect of such statutes is to render inadmissible as a matter of policy any evidence on the alleged victim's past sexual conduct or reputation or opinion evidence of the same. The purposes are to prevent a criminal trial for rape or other sex crimes from becoming a review of the victim's sexual history and, by removing such possibility, to encourage victims to come forth and seek help through the criminal process.

73. 111 S. Ct. 1743 (1991).

74. *Id.* at 1748.

75. IND. CODE § 35-37-4-4 (1988).

76. 111 S. Ct. 1899 (1991).

77. 421 U.S. 794 (1975).

78. *Mu'Min*, 111 S. Ct. at 1908.

79. *Id.*

80. 111 S. Ct. 1884 (1991).

unlawful act.⁸¹ (South Carolina had no felony murder statute.) The Court noted that juries can be instructed on a permissive inference (as opposed to a presumption), provided there is a sufficiently rational connection between the basic facts and the facts to be presumed.⁸²

IX. CRUEL AND UNUSUAL PUNISHMENT

*Harmelin v. Michigan*⁸³ generated deep division and long exposition on the "proportionality" aspect of the Eighth Amendment prohibition against cruel and unusual punishment. Defendant, a first offender, was sentenced to life with no possibility of parole for possession of 672 grams of cocaine under a statutory sentencing mandate. The Court upheld the sentence as not "grossly disproportionate."⁸⁴ Two Justices would jettison the proportionality aspect entirely as being outside the history and intent of the Eighth Amendment. Five held the statute was not in fact grossly disproportionate even though it mandated the sentence with no case-specific findings.

X. PROSECUTORIAL IMMUNITY

Burns v. Reed,⁸⁵ a case from Delaware County, was not itself a criminal case, but a section 1983 action against a prosecutor. However, it has obvious and far-reaching consequences for those in criminal practice. A six Justice majority of the Court reinforced the total immunity of public prosecutors set forth in *Imbler v. Pachtman*⁸⁶ for actions arising out of judicial proceedings. Thus, even though the plaintiff alleged that the prosecutor had been party to misleading a judge during a probable cause hearing, because such hearing is part and parcel of the judicial proceeding, absolute immunity applied. However, the plaintiff also alleged that the prosecutor gave improper advice to the police in advising that they could hypnotize the plaintiff (who was a suspect). As to this charge, the Court unanimously held that the prosecutor is to have only qualified immunity because giving advice to police during the investigative stage is not within the judicially connected part of the prosecutor's function.⁸⁷ The Court noted that it was anomalous to extend total immunity to a prosecutor for giving legal advice to police and to give police only qualified immunity for following it.⁸⁸

81. *Id.* at 1888.

82. *Id.* at 1897.

83. 111 S. Ct. 2680 (1991).

84. *Id.* at 2704.

85. 111 S. Ct. 1934 (1991).

86. 424 U.S. 409 (1976).

87. *Borus*, 111 S. Ct. at 1943.

88. *Id.*

XI. DUE PROCESS

In *Schad v. Arizona*,⁸⁹ a five to four Court decided an intriguing set of questions arising in a first degree murder prosecution. The Arizona murder statute, as is common, collected under the one heading, "first-degree murder," both premeditated killings and felony murder killings.⁹⁰ Although this grouping is not historically unusual, no one ever seriously doubted that premeditated killing and felony murder were different crimes. Their constituent elements are clearly different.⁹¹ There was some evidence supporting each crime — the killing was arguably premeditated and was alleged to have occurred during a robbery. The instructions did not require that the jury unanimously agree on a single theory. In effect, the trial court instructed the jury that these were merely two different ways to get to the same crime — first degree murder. Nor was the jury required to announce how it arrived at a verdict; it was sufficient that all twelve agreed to first degree murder. Thus, even though theoretically only six believed the killing was premeditated and only six believed it was committed during a robbery, the jury could, and did, convict. The Supreme Court held that there was no constitutional infirmity in the instruction since these were two theories which underlay the same offense, first-degree murder.⁹² This decision is truly astounding. It calls into question the protections afforded by the "beyond a reasonable doubt" protection and the "substantial majority decision" requirement.⁹³

The defendant also complained that the jury was not given the option of finding him guilty of robbery as a lesser included offense in contravention of the rule in *Beck v. Alabama*.⁹⁴ *Beck* stands for the proposition that omitting the lesser included offense choice (assuming, of course, it is supported by evidence) places the jury in an all-or-nothing

89. 111 S. Ct. 2491 (1991).

90. ARIZ. REV. STAT. ANN. § 13-452 (repealed 1978).

91. First degree premeditated murder requires proof of an intent to kill plus the aspect of premeditation which implies an intent achieved after deliberation, thought, or planning. It requires no proof that the defendant was engaging in an independent felony. Felony murder, on the other hand, requires no proof of intent to kill, but instead requires proof that death was caused by the defendant while engaging or attempting to engage in one of the felonies listed in the statute, such as burglary, rape, or robbery.

92. *Schad*, 111 S. Ct. at 2505. This decision has an obvious application in Indiana. The Indiana murder statute, IND. CODE § 35-42-1-1 (Supp. 1991), groups under the one heading and statute "intentional" or "knowing" killing on the one hand and felony murder on the other.

93. Until 1972, criminal juries had to be unanimous to convict. In *Apodaca v. Oregon*, 406 U.S. 404 (1972), the Court upheld the constitutionality of a statute which permitted conviction (or acquittal) on fewer than 12 (in that case 10). Yet, the Court's opinion in *Apodaca* made it clear that a bare majority is insufficient.

94. 447 U.S. 625 (1980).

posture and exerts unfair pressure toward conviction.⁹⁵ The *Schad* Court found that *Beck* was not controlling because the jury, though it was not given a robbery option, was given a second degree murder option, thereby taking this out of the all-or-nothing rule.⁹⁶ This second holding is, of course, generated by the first and demonstrates the kind of problems such a holding can produce. If one begins by understanding premeditated first degree murder and felony murder as the *same crime*, then second degree murder surely is a lesser included offense. However, second degree murder is not lesser included in felony murder because felony murder requires no proof of intent to kill and second degree murder does. Those jurors (anywhere from zero to twelve) whose verdict was based on a felony murder theory had no lesser crime to select other than as a purely irrational compromise verdict. Those jurors were in precisely the posture that the *Beck* rule was designed to avoid.

XII. CONFRONTATION

In *Brady v. State*,⁹⁷ criminal law practitioners were reminded of the importance of basing their clients' claims on all available grounds, including the Indiana Constitution. State procedures which meet the minimal requirements of the federal constitution may not pass muster when examined for compliance with the requirements of the Indiana Constitution. The right of confrontation serves as a recent example.

In *Brady*, the State sought leave to videotape the testimony of a child witness who was alleged to have been sexually abused. Videotaping such testimony was authorized by statute.⁹⁸ The statute permitted a court to order the videotaping of a child's testimony for use at trial if, among other requirements, the child was the victim, was less than ten years old, and would be traumatized by testifying in the courtroom. Finding all statutory requirements to be met, the trial court ordered the child's testimony to be videotaped prior to trial. The testimony was taken in the child's home with the child, judge, prosecutor, defense counsel, child's mother, and video operator present. The defendant was located in the garage of the home and was able to see and hear the child via closed circuit television. The defendant could speak with his counsel by microphone. The child could not see or hear the defendant and was not aware of his presence.

The Indiana Supreme Court first focused on the Sixth Amendment requirement that the accused shall enjoy the right "to be confronted

95. *Id.* at 645-46.

96. *Schad v. Arizona*, 111 S. Ct. 2491, 2505 (1991).

97. 575 N.E.2d 981 (Ind. 1991)

98. IND. CODE § 35-37-4-8 (Supp. 1991).

with the witnesses against him.”⁹⁹ On this issue, the court found *Maryland v. Craig*¹⁰⁰ to be controlling. In *Craig*, the United States Supreme Court upheld the constitutionality of a similar Maryland procedure which permitted the child’s live testimony to be transmitted to the courtroom via one-way closed circuit television.¹⁰¹ *Craig* made clear that the Confrontation Clause does not require an actual face-to-face encounter at trial in every instance.¹⁰² Rather, the Sixth Amendment confrontation right is generally met if the defense is given a full and fair opportunity to probe through cross-examination.¹⁰³ Although the Indiana statutory procedure was slightly different than that analyzed in *Craig*,¹⁰⁴ the essential requirements of confrontation as defined by *Craig* were present.¹⁰⁵

The procedure did not fare so well when tested against the right of the accused “to meet the witnesses face to face” as guaranteed by the Indiana Constitution.¹⁰⁶ The court recognized that the federal confrontation requirement and the Indiana provision have much the same meaning and share a similar history.¹⁰⁷ Both are designed primarily to protect the right of cross-examination.¹⁰⁸ Nevertheless, unlike the Sixth Amendment confrontation right, the Indiana guarantee is not fulfilled by merely ensuring that the right to cross-examine is scrupulously honored.¹⁰⁹ The specific language guaranteeing “the right . . . to meet the witnesses face to face” recognizes that face-to-face encounters do influence recollection, veracity, and communication.¹¹⁰

Because the statutory procedure mandated that the child not be able to see or hear the accused, those particular provisions of the statute

99. U.S. CONST. amend. VI.

100. 110 S. Ct. 3157 (1990).

101. *Id.* at 3166.

102. *Id.* at 3164.

103. *Id.*

104. The Maryland procedure provided for the child’s live testimony to be taken outside the courtroom and transmitted to the factfinder and defendant. The Indiana statute authorized the same procedure or, as actually employed in the instant case, videotaping the testimony prior to trial with the defendant separated from the child.

105. *Craig* holds that the presence of an oath, cross-examination, and the ability to observe the witnesses’ demeanor, albeit by close circuit camera, are sufficient to ensure reliability and that adversarial probing occurs. With these attributes, the testimony is deemed the functional equivalent of live, in-person testimony. *Maryland v. Craig*, 110 S. Ct. 3157, 3166 (1990).

106. IND. CONST. art 1, § 13. Failure to apply the face-to-face requirement in circumstances such as these is not fundamental error. *Hart v. State*, 578 N.E.2d 336 (Ind. 1991). Thus, failure to assert the claim at trial precludes the claim on appeal. *Id.* at 338.

107. *Brady v. State*, 575 N.E.2d 986, 987 (Ind. 1991).

108. *Id.* at 985, 988.

109. *Id.* at 988.

110. *Id.* (citing IND. CONST., art 1, § 13).

must fail as violative of the defendant's right to a face-to-face meeting with the witness.¹¹¹ Thus, the Indiana confrontation requirement provides greater protection to the accused than does its federal counterpart embodied in the Sixth Amendment.

The court noted that a face-to-face meeting could be accomplished by use of a two-way closed circuit arrangement which would permit the separated witness and the accused to see one another.¹¹² Such a procedure would not only satisfy the face-to-face requirement, but would also accomplish the essential purpose of the statute, affording protection to the child witness.

XIII. TRIAL EVIDENCE

The next significant case, *Modesitt v. State*,¹¹³ also involved the admissibility of a child's statements in a sex abuse case. Although not of constitutional dimension, the ruling has far-reaching effects. In *Modesitt*, the accused was pummeled by testimony from the child's mother, a welfare case worker, and a psychologist regarding statements the child had made to each of them. The hearsay statements were admitted on the authority of *Patterson v. State*.¹¹⁴ The child testified after this testimony was received. She corroborated most of the acts previously narrated via the hearsay, but not all. She was not asked specifically whether she made the statements attributed to her by the other three witnesses nor whether the statements were true.

The court first inquired whether the *Patterson* rule was abused. The court noted that the rationale for the *Patterson* holding, which permitted admission of prior statements as substantive evidence, was that the truthfulness of the statement could be tested by cross-examination of the declarant.¹¹⁵ This rationale was the basis for the *Patterson* requirement that the declarant be present and available for cross-examination. The rule was not intended to permit the out-of-court statements to serve as a substitute for direct testimony.¹¹⁶ Such substitution occurred in *Modesitt* because the three witnesses told the victim's story and continually repeated her accusations before the victim testified. As a result, the accused was denied the opportunity to cross-examine the declarant in a timely fashion

111. *Id.* The offensive provisions are subsections (c) and (f)(7) of IND. CODE § 35-37-4-8 (Supp. 1991).

112. *Brady v. State*, 575 N.E.2d 980, 989 (Ind. 1991).

113. 578 N.E.2d 649 (Ind. 1991).

114. 324 N.E.2d 482 (Ind. 1975). *Patterson* permitted the admission of prior out of court statements, not under oath, as substantive evidence if the declarant was present and available for cross-examination at the time of admission.

115. *Modesitt*, 578 N.E.2d at 651.

116. *Id.*

regarding the truthfulness of the statements. Moreover, the constant repetition of the accusations resulted in the victim's credibility being established before the victim said a word. The court concluded that the *Patterson* rule had been abused and the defendant prejudiced by the "drumbeat repetition of the victim's original story prior to calling the victim to testify."¹¹⁷

The court then overruled *Patterson* because the simple rule first adopted in that case was no longer recognizable as applied.¹¹⁸ Instead, the court adopted the content of Rule 801(d)(1)(A) of the Federal Rules of Evidence.¹¹⁹ Prior statements may be admitted as substantive evidence only if the declarant testifies at trial and is subject to cross-examination concerning the statement and the statement is: (a) inconsistent with the declarant's testimony and was given under oath; (b) consistent with the declarant's testimony and is offered to rebut a charge of recent fabrication, improper influence or motive; or (c) one of identification of a person made after perceiving the person.¹²⁰

In another case involving the admissibility of prior statements, *Thomas v. State*,¹²¹ the issue was intertwined with the right of the accused to present a defense. In *Thomas*, the defendant sought to introduce the prior statements of one Nelson. Nelson allegedly bragged to others that he committed the robbery for which Thomas was on trial. In addition, other evidence existed which implicated Nelson. Specifically, early in the police investigation a clerk from a store near the robbery scene had selected Nelson's picture from a photo array and identified him as being present near the scene at the time of the robbery.

Nelson was called as a witness but declined to testify and invoked his right against self-incrimination. Thomas then offered Nelson's prior statements that he committed the robbery. The trial court declined to admit the statements attributed to Nelson on hearsay grounds. The court of appeals affirmed finding that third party confessions and declarations against penal interest are permeated with untrustworthiness. The Indiana Supreme Court reversed and observed that an accused has a constitutional right to put on a defense¹²² citing *Chambers v. Mississippi*.¹²³ The court did not sanction the blanket admissibility or inadmissibility of declarations against penal interest. Rather, it concluded that declarations against penal interest should be admitted if corroborating circumstances clearly indicate

117. *Id.* at 652.

118. *Id.*

119. *Id.* at 653.

120. *Id.* at 653-54.

121. 580 N.E.2d 224 (Ind. 1991).

122. *Id.* at 226.

123. 410 U.S. 284 (1973).

the trustworthiness of the statement.¹²⁴ This approach is the same as that identified in *Chambers* and the Federal Rule of Evidence 804(b)(3). Applying this test to the facts of *Thomas*, the court concluded that corroboration was provided by the initial identification of Nelson, the number of people to whom he had bragged, and the detail of the statements in which he admitted that he had perpetrated the robbery.¹²⁵ Accordingly, the court found that Thomas should have been allowed to present Nelson's statements against his penal interest as exceptions to the hearsay rule.

The last significant case to be surveyed pertaining to trial evidence is *Hopkins v. State*.¹²⁶ *Hopkins* deals with the admissibility of forensic DNA evidence. By statute, Indiana has already provided that the results of forensic DNA analysis are admissible without antecedent expert testimony that such evidence provides a trustworthy and reliable method of identifying characteristics in an individual's genetic material.¹²⁷ The statute was passed after the events giving rise to the *Hopkins* case. Thus, some aspects of the *Hopkins* decision, specifically the question of whether the theory and techniques of DNA analysis can produce reliable results generally accepted in the scientific community, has been mooted by the statute. The *Hopkins* court answered this inquiry in the affirmative.¹²⁸

Notwithstanding the statute, *Hopkins* is important for two reasons. First, the court utilized the test of *Frye v. United States*,¹²⁹ to assess the reliability of the novel scientific evidence.¹³⁰ Although it utilized this test, the majority stopped short of holding that the *Frye* test is the required standard to be used in determining the admissibility of novel scientific evidence in Indiana. As it stands now, some cases, such as *Hopkins*, use the *Frye* test which requires general scientific acceptance of the theory and technique employed. Others require only a finding

124. *Thomas*, 580 N.E.2d at 226.

125. *Id.* at 227.

126. 579 N.E.2d 1297 (Ind. 1991).

127. IND. CODE § 35-37-4-13 (Supp. 1991).

128. *Hopkins*, 579 N.E.2d at 1302.

129. 293 F. 1013 (D.C. Cir. 1923).

130. The *Frye* test, as discussed with apparent approval by the majority in *Hopkins*, has three elements: (1) "Is there a theory, which is generally accepted in the scientific community, which supports the conclusion that DNA forensic testing can produce reliable results?" (2) "Are there techniques or experiments that currently exist that are capable of producing reliable results in DNA identification and which are generally accepted in the scientific community?" (3) "Did the testing laboratory perform the accepted scientific techniques in analyzing the forensic samples in this particular case?" *Hopkins*, 579 N.E.2d at 1302. This test is more stringent, as pointed out by Justice Dickson, than Federal Rule of Evidence 702, which does not require general scientific acceptance of the theory or techniques. *Id.* at 1306 (Dickson, J., concurring) (observing that the majority's discussion of *Frye* should not be construed as an endorsement or rejection of the *Frye* test).

that the subject matter of the expert's opinion be beyond the knowledge of lay persons and that the expert's knowledge will aid the jury.¹³¹

The second important aspect of *Hopkins* involves the issue of whether claimed irregularities in the DNA testing procedure actually employed go to the admissibility of the evidence or merely to its weight. In *Hopkins*, the defendant asserted that irregularities had occurred. The court responded by indicating that once the trial court rules a witness qualified to give expert testimony as a matter of law, subsequent evaluation of the evidence goes only to its weight as a matter of fact.¹³² Thereafter, on a chain of custody claim, the court indicated that "the proponent is not required to exclude all possibility of tampering, but need only provide a reasonable assurance that the evidence remained in undisturbed condition."¹³³ Does this mean that proof of some irregularities such as the mishandling of the specimen may go to admissibility?

Whether test procedure errors or omissions might affect more than the weight to be given the evidence and actually determine admissibility was addressed again in *Davidson v. Indiana*.¹³⁴ In *Davidson*, the admissibility of DNA evidence was again challenged on the ground that irregularities had occurred in the test procedures. Again, the court indicated that irregularities in the test procedures go to the weight of the evidence,¹³⁵ but then added, "[W]hile it might be that substantiated irregularities would be a basis for prohibiting admission of test results, the list of irregularities [defendant] Davidson perceives do not cause us to believe the evidence was erroneously admitted."¹³⁶ Thus, the fact finder is still out on the question of whether some test irregularities might affect admissibility and if so, the nature of those irregularities, the burden allocation, and the quantum of proof necessary to establish the same.

XIV. SENTENCING

In *Slocumb v. State*,¹³⁷ the court dealt with a new question of law concerning habitual offender sentencing and Indiana Code 35-50-2-8(h), which provides: "A person may not be sentenced as an habitual offender under this section if all the felonies relied upon for sentencing the person as an habitual offender are class D felonies."¹³⁸ Slocumb argued that

131. See *id.* at 1305-06 (Dickson J., concurring).

132. *Id.*

133. *Id.* at 1304.

134. 580 N.E.2d 238 (Ind. 1991).

135. *Id.* at 243.

136. *Id.*

137. 573 N.E.2d 427 (Ind. 1991).

138. IND. CODE § 35-50-2-8(h) (Supp. 1991).

this statute precluded a thirty year enhancement of sentence if the prior convictions are from other states and the penalty imposed for each conviction was within the sentencing range for Indiana class D felonies. It is interesting to note that the court went out of its way to address this issue. Regardless of the resolution to this question, Slocumb's sentence had to be vacated because the State failed to prove that the prior convictions were felonies. Thus, the evidence was insufficient to establish that he was a habitual offender.¹³⁹ Notwithstanding the presence of this outcome determinative issue, the court addressed the effect of section 35-50-2-8(h) on Slocumb's case.

The court's discussion of the statute seems to go beyond the foreign versus domestic felony grading issue and indicates that when all prior felonies are at the class D level, the accused is not eligible for a thirty year enhancement *regardless of the nature of the present offense*.¹⁴⁰ Some vagueness remains for two reasons. First, Slocumb's current offense was a class D felony; thus, the court may not have believed it necessary to state that the statutory prohibition only applied if the current offense, as well as the prior convictions, were class D felonies. Second, such a construction would leave an apparent gap in the law. Note that the statute dealing with class D habitual offenders seems to require that the current offense, as well as all prior convictions, be class D felonies.¹⁴¹

Thus, the offender with a class C felony charge, as the current offense, and a history of D felony convictions, cannot be determined to be a class D habitual offender. Now assume that *Slocumb* precludes a thirty year enhancement when all the prior offenses are class D felonies, regardless of the nature of the current charge. The result is that the defendant currently charged with a class A, B, or C felony who has a history of class D felony offenses is not eligible for any enhancement. Regardless of the court's intent, *Slocumb* gives rise to such an argument.

In another sentencing case, *Hensley v. State*,¹⁴² the court of appeals held that statements made during a "clean-up statement" which the accused provided as part of a failed plea agreement were not admissible at sentencing.¹⁴³ The court emphasized that the rule prohibiting the admission of such statements in evidence is a substantive rule and not

139. *Slocumb*, 573 N.E.2d at 429.

140. *Id.* at 428 ("[T]he apparent purpose of these amendments was to render ineligible for 30-year enhancements those persons whose prior offenses were the least serious felonies.")

141. IND. CODE § 35-50-2-7.1 (Supp. 1991). See *id.* § 35-50-2-7.1(c) (providing that the eight year enhancement shall be added to the sentence imposed under Section 7 of the chapter). Section 7 deals with class D felony sentencing.

142. 573 N.E.2d 913 (Ind. Ct. App. 1991).

143. *Id.* at 918.

merely an evidentiary rule. Thus, admission of such statements is barred at sentencing as well as trial.¹⁴⁴

As a final note regarding sentencing, the legislature extended the period for modification of sentence without the approval of the prosecuting attorney from 180 days to 365 days.¹⁴⁵ This modification probably is entitled to retroactive effect on the theory that an extension of time to do that which is permitted already is procedural and therefore, outside the general rule that the law in effect at the time the offense was committed controls sentencing.¹⁴⁶

XV. POST CONVICTION

The road to federal habeas review becomes more difficult with each successive term of the United States Supreme Court. This year was no exception. The Court reviewed several cases involving those dreaded omissions known as procedural defaults.

In *Coleman v. Thompson*¹⁴⁷ counsel filed a notice of appeal to secure review of the denial of state habeas corpus relief three days late. The State moved to dismiss the appeal as untimely. The parties filed briefs on the subject of the dismissal motion and on the merits. The state appellate court issued a summary order granting dismissal. The order did not discuss the grounds for dismissal except to state, after identifying all the papers filed, "Upon consideration whereof, the motion to dismiss is granted."¹⁴⁸

At the Supreme Court, Coleman argued that the plain statement rule of *Harris v. Reed*¹⁴⁹ controlled. The *Harris* Court held that when a defendant fails to raise a claim in accordance with state procedures but did present the claim to a state court, the state court ruling rejecting the claim will not be viewed as resting on the procedural default unless the state court clearly indicates that it relied on that ground.¹⁵⁰ *Harris* unequivocally provided that a procedural default will not bar federal review unless the last state court rendering judgment clearly and expressly states that its judgment rests on a state procedural bar.¹⁵¹

In response, the Court found that "[a] predicate to the application of the *Harris* presumption is that the decision of the last state court to which petitioner presented his federal claims must fairly appear to rest

144. *Id.*

145. IND. CODE § 35-38-1-17 (Supp. 1991).

146. *Willis v. State*, 567 N.E.2d 1170 (Ind. Ct. App. 1991).

147. 111 S. Ct. 2546 (1991).

148. *Id.* at 2553.

149. 489 U.S. 255 (1989).

150. *Id.* at 263.

151. *Id.*

primarily on federal law or to be interwoven with federal law.”¹⁵² On examination, the factual predicate did not appear to exist in *Coleman*. That is, it did not appear that the dismissal order rested on, or was interwoven with, federal law.¹⁵³ As a consequence, Coleman was not entitled to the *Harris* presumption. Coleman simply had defaulted under state law.

Coleman sought to excuse the procedural default by arguing that the omission occurred because of attorney error. The Court found that because Coleman had no right to counsel to pursue his state habeas corpus appeal, any attorney error regarding that appeal cannot constitute cause to excuse the procedural default.¹⁵⁴ Counsel’s ineffectiveness will constitute cause only if it is an independent constitutional violation.¹⁵⁵ Absent a constitutional right to counsel, there can be no independent constitutional violation because of counsel’s ineffectiveness.

The *Harris* plain statement rule was limited further in *Ylst v. Nunnemaker*.¹⁵⁶ In *Ylst*, the Court faced a scenario in which the last state court denied relief summarily without stating that a state procedural bar was the basis for the judgment. However, an intermediate appellate court explicitly found a state procedural bar.¹⁵⁷ In *Ylst*, the plain statement rule was modified again by the following presumption: “[W]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground.”¹⁵⁸ Thus, if the earlier decision addressed the merits of federal claims and denied relief, a later unexplained denial will be presumed to rest on federal law. On the other hand, if the earlier opinion finds that the defendant is not entitled to review on the merits because of a state procedural bar, a subsequent unexplained denial will be presumed to rest on the same grounds, i.e., the procedural default. The presumption is rebuttable by strong evidence.¹⁵⁹

In another significant decision, *McCleskey v. Zant*,¹⁶⁰ the Court adopted a new rule redefining the doctrine known as “abuse of the writ.” At McCleskey’s state court murder trial, another jail inmate, Evans, testified that McCleskey boasted about the killing. After his direct appeal, McCleskey sought state habeas corpus relief on the ground that

152. *Coleman v. Thompson*, 111 S. Ct. 2546, 2559 (1991).

153. *Id.*

154. *Id.* at 2568.

155. *Id.* at 2567.

156. 111 S. Ct. 2590 (1991).

157. *Id.* at 2592.

158. *Id.* at 2594.

159. *Id.* at 2595.

160. 111 S. Ct. 1454 (1991).

the statements to Evans were elicited in a situation created by the State to induce him to make statements without the assistance of counsel in violation of *Massiah v. United States*.¹⁶¹ The state habeas court denied relief and the Georgia Supreme Court denied discretionary review.

Thereafter, McCleskey sought federal habeas corpus relief but did not raise the *Massiah* issue. Ultimately, that petition was denied. One month before filing his second petition, McCleskey finally received a twenty-one page statement that Evans had made to police two weeks before McCleskey's original trial began.¹⁶² In addition, McCleskey located the jailer in whose office the statement from Evans was taken. At the hearing on the second federal petition, the jailer testified that he had been asked to move Evans close to McCleskey.

In the end, McCleskey's claim was of no avail. The Supreme Court found that he had "abused the writ" by failing to assert the *Massiah* claim in his first federal petition.¹⁶³ The claim was available at that time as was demonstrated by its inclusion in his earlier state habeas corpus petition. The Court found that the abuse of the writ doctrine was not limited to cases involving deliberate abandonment.¹⁶⁴ Anticipating criticism that such a limitation was imposed by *Sanders v. United States*,¹⁶⁵ the Court asserted that *Sanders* discussed deliberate abandonment as one example of conduct that results in forfeiture.¹⁶⁶

Under the *McCleskey* rule, a petitioner can abuse the writ by raising a claim in a second petition that he could have raised in his first petition, regardless of whether the omission was deliberate.¹⁶⁷ To excuse such an omission, the petitioner must show cause and prejudice, as we now understand those terms, or show that a fundamental miscarriage of justice would result from a failure to entertain the claim.¹⁶⁸ A fundamental miscarriage of justice occurs when an innocent man suffers an unconstitutional loss of liberty.¹⁶⁹

XVI. DEATH PENALTY

Perhaps the most significant Indiana development in the area of death penalty law and practice was the amendment of Criminal Rule

161. 377 U.S. 201 (1964).

162. McCleskey's claims under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. (1972) had already been denied.

163. *McCleskey*, 111 S. Ct. at 1471, 1473.

164. *Id.* at 1467.

165. 373 U.S. 1 (1963).

166. *McCleskey*, 111 S. Ct. at 1467.

167. *Id.* at 1468.

168. *Id.* at 1470.

169. *Id.* at 1471 (citing *Stone v. Powell*, 428 U.S. 465, 492-93 (1976)).

24 to provide standards for the appointment of counsel and for compensation of counsel.¹⁷⁰ Under the new rule, upon a finding of indigency, the court shall appoint two qualified attorneys for trial. To qualify as lead counsel, one must have at least five years of criminal litigation experience with no fewer than five completed felony jury trials and at least one capital case. Co-counsel must have at least three years experience with at least three felony jury trials tried to completion. Both counsel must have completed at least twelve hours of training in the defense of capital cases within two years of the appointment.¹⁷¹ The rule also provides that trial counsel shall be appointed to serve as appellate counsel, if qualified.¹⁷² Appellate counsel must have three years experience in criminal litigation and have appellate experience in at least three felony appeals within the five year period prior to appointment. The training requirements applicable to trial counsel must also be met by appellate counsel.¹⁷³

When appointing trial or appellate counsel, the court is required to assess the nature and volume of counsel's workload to assure that sufficient attention can be directed to the defense of the capital case.¹⁷⁴ Specific workload limitations are imposed on salaried or contractual public defenders appointed as trial counsel in capital cases. Such a defender may be appointed only if his or her workload will not exceed twenty open felony cases while the capital case is pending; no new cases may be assigned to such counsel within thirty days of the trial setting in the capital case.¹⁷⁵ Similarly, if appellate counsel is under contract to provide other defense services, no new cases for appeal shall be assigned to that counsel until the brief is filed in the capital case.¹⁷⁶

Compensation for counsel is set at an hourly rate of seventy dollars per hour for all necessary and reasonable services,¹⁷⁷ with adjustments to the compensation paid contract employees for other defense services to reflect the limitations on case assignments.¹⁷⁸ The rule also provides that trial counsel shall be provided with sufficient funds for investigative, expert, and other services necessary to present a defense at every stage of the proceeding, including sentencing.¹⁷⁹

170. IND. CRIM. R. 24.

171. IND. CRIM. R. 24(B)(1), (2).

172. IND. CRIM. R. 24(J).

173. *Id.*

174. IND. CRIM. R. 24(B)(3), (J)(2).

175. IND. CRIM. R. 24(B)(3).

176. IND. CRIM. R. 24(J)(2).

177. IND. CRIM. R. 24(C)(1), (K)(1).

178. IND. CRIM. R. 24(C)(3), (K)(2).

179. IND. CRIM. R. 24(C)(2).

In case law developments, the United States Supreme Court overruled *Booth v. Maryland*,¹⁸⁰ and *South Carolina v. Gathers*,¹⁸¹ the victim impact cases. This reversal of recent precedent came in *Payne v. Tennessee*,¹⁸² in which the Court held that the Eighth Amendment does not bar the admission of victim impact evidence or prosecutorial argument on the subject.¹⁸³ In *Payne*, the Court concluded that the reasoning of *Booth* and *Gathers* was flawed. Both were described as being premised on the notion that victim impact evidence does not reflect on the defendant's blameworthiness and that only evidence relating to blameworthiness is relevant in a capital sentencing.¹⁸⁴ The Court concluded that evidence of the harm inflicted, i.e., the impact on the victim, has been and is an important factor in determining the appropriate punishment to be imposed in criminal cases.¹⁸⁵ In the Court's view, a state could conclude that evidence of the specific harm caused by the accused is relevant to the defendant's moral culpability and blameworthiness.¹⁸⁶ This being the case, there is no reason to treat such evidence differently than other relevant evidence; at least, the Eighth Amendment erects no such bar.¹⁸⁷ If victim impact evidence is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause provides the vehicle for relief.¹⁸⁸

XVII. CONCLUSION

Federal and Indiana courts continue to hear a high volume of criminal cases. The overall direction of the trend, manifested both in court decisions and legislative enactments, continues to be toward providing greater scope to criminal law enforcement and a narrowing of constitutional due process interests. However, as the Supreme Court of the United States narrows constitutional rights, the Indiana Supreme Court clearly maintains the momentum established over the past several years to expanding protections under the state constitution. That document seems slowly to be rising from its torpor.

180. 482 U.S. 496 (1987).

181. 490 U.S. 805 (1989).

182. 111 S. Ct. 2597 (1991).

183. *Id.* at 2609.

184. *Id.* at 2605.

185. *Id.* at 2608.

186. *Id.*

187. *Id.* at 2609.

188. *Id.* at 2608.

Clean Air Act Amendments Leave Small Business Up In The Air

PETER M. RACHER*

The Clean Air Act Amendments of 1990 (Amendments) — the first major federal air initiative in thirteen years — have set in motion new environmental rules and programs that will change the way America does business.¹ The Amendments will cost the nation billions of dollars² and will keep the United States Environmental Protection Agency (EPA) busy writing new rules for years. The Amendments will address acid rain, ozone depletion, the greenhouse effect, and a number of other vexing pollution problems, and will leave small businesses gasping for breath as they try to comply for the first time with federal air pollution control requirements. Small companies will have to consider conducting emission inventories, installing air pollution control devices, changing their materials and processes, applying for permits, and completing paperwork to comply with new rules. Many more clients will need legal advice on air compliance issues.

I. AIR

The 1990 Clean Air Act Amendments consist of eleven separate titles.³ Collectively, the Amendments require EPA to promulgate some 175 new regulations, 30 guidance documents, and 23 reports. The agency must also establish a number of panels and initiate a variety of research

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1. The breadth of the Clean Air Act Amendments and their implementing regulations has evoked an array of superlatives. See, e.g., *Air Pollution: Focus Turns to Clean Air Act Regulations*, Env't Rep. (BNA) at S-5 (Jan. 16, 1992) ("controversial and far reaching"); Ralph Hall, *What Do The 1990 Clean Air Act Amendments Mean For Indiana Business?*, OUTLOOK, Aug.-Sept. 1991, at 19 ("massive piece of legislation"; "compared in complexity to the entire Internal Revenue Code"; "will have a profound impact on business and on the regulatory agencies"); David A. Wollin, *Air-Toxics Laws Force Industries to Plan Ahead*, NAT'L L.J., May 13, 1991, at 25 ("one of the most comprehensive environmental statutes in decades").

2. EPA says that the Clean Air Act Amendments will actually stimulate the nation's economy by spurring growth in the air pollution control industry. See Env't Rep. (BNA) at AA-1 (Jan. 16, 1992) (according to EPA the Amendments will create 60,000 new jobs by the year 2000).

3. See Pub. L. No. 101-549, 104 Stat. 2399 (1990).

projects.⁴ Small businesses that do not plan ahead may be overwhelmed by the crush of new requirements. This Article will provide a summary of the law's goals and most significant features.

A. Ozone Depletion

The loss of protective ozone in the upper atmosphere over many parts of the world is a major human health and environmental concern.⁵ The United Nations and the World Meteorological Organization have determined that damage to the ozone layer is accelerating and that heavily populated parts of the world, including portions of the United States, are at risk.⁶

To combat ozone depletion, Title VI of the Clean Air Act Amendments imposes dramatic cuts on the production and use of the most potent ozone depleters, such as chlorofluorocarbons, which are widely used in refrigeration and air conditioning and as solvents and aerosol propellants.⁷ This is consistent with the Montreal Protocol, a treaty that has been signed by the United States and seventy-three other countries.⁸ Carbon tetrachloride, one of the most widely used solvents in the nation, must be cut by 1995 to fifteen percent of the amount used in 1989 and entirely phased out by the end of the decade.⁹ Other depleters must be reduced along a more gradual schedule, but must still be eliminated by the year 2000.¹⁰ EPA has discretion to accelerate the phase-out if the Montreal Protocol is modified to require faster reductions.¹¹ While the

4. *Id.*

5. Shirish Date, *Northern Ozone Hole May Open Up*, INDIANAPOLIS STAR, Feb. 4, 1992, at A1.

6. *New Studies Show Extended Damage to Ozone Layer*, INDIANAPOLIS STAR, Oct. 25, 1991, at A1, A8 [hereinafter *New Studies*].

7. The use or production of other ozone depleting chemicals, such as halons, carbon tetrachloride, and methyl chloroform, will also be phased out under Title VI. 42 U.S.C.A. § 7671c(a) (West Supp. 1991).

8. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541, 1544 (entered into force Jan. 1, 1989).

9. The chemical company E.I. du Pont de Nemours, the world's largest producer of chlorofluorocarbons (CFC), has pledged to halt production of CFCs by 1997, three years ahead of schedule. The company also pledged to speed the phase-out of substitutes that are less destructive than CFCs but are still capable of damaging the ozone layer. See *New Studies*, *supra* note 6, at A8.

10. Hydrochlorofluorocarbons (HCFCs) can continue to be produced and used, but new uses of HCFCs are banned by January 1, 2015, unless the chemicals are used, recovered, and recycled, used as a feedstock, or used as a refrigerant in appliances manufactured before the year 2020. Production of HCFCs will be frozen in the year 2015 and gradually phased out by the year 2030. See 42 U.S.C.A. § 7671d(a) (West Supp. 1991).

11. *Id.* § 7671e(a).

phase-out is under way, companies may produce or use a different mix of ozone depleting substances or they may trade production or consumption allowances with other companies, *provided* that the change results in greater total reductions for each substance than would otherwise be achieved.¹²

Meanwhile, Title I of the Clean Air Act Amendments imposes new restrictions on the emission of photochemically reactive volatile organic compounds (VOCs) and nitrogen oxides (NO_x-s), both of which are believed to contribute to the formation of ozone in the air people breathe. Ozone close to the earth can initiate damage to lungs, trees, crops, and materials. Regions of the country that have not attained the national ambient air quality standard for ozone must cut VOCs and NO_x emissions until the standard is met.¹³ Each region's compliance deadline depends on the seriousness of the ozone problem. For example, Lake and Porter counties, which have been graded "serious," must achieve "attainment" status by 1999.¹⁴ Clark and Floyd counties are "moderate" and have until 1996 to reach attainment.¹⁵ Marion, Vanderburgh, St. Joseph, and Elkhart counties, which are rated "marginal," have until 1993.¹⁶ All other Indiana counties already are at attainment levels.

If the counties ranked "marginal," "moderate," or "serious"¹⁷ fail to meet their attainment deadlines, then those counties can get bumped up to the next higher classification (e.g., "marginal" gets moved to "moderate," "moderate" to "serious," "serious" to "severe," and so forth). This means that VOC emitters in those regions must achieve even more stringent limitations. Achieving attainment status under the current deadlines will be difficult. Meeting stepped-up requirements will be even more difficult if a county is bumped up into a higher classification. Some observers predict that current "marginal" and "moderate" ozone nonattainment areas will eventually be bumped up to the "serious" nonattainment category by virtue of their inability to meet the compliance deadlines even though these areas are close to attainment.¹⁸

B. Acid Rain

Title IV of the Clean Air Act Amendments seeks to reduce acid rain by cutting sulfur dioxide (SO₂) and NO_x emissions from coal-fired

12. *Id.* § 7671f.

13. *Id.* § 7511a.

14. *See id.* § 7511(a)(1).

15. *See id.*

16. *See id.*

17. There are no "serious," "severe," or "extreme" ozone nonattainment areas in Indiana.

18. *See* Mel Schulze, *Inconsistencies and Other Drafting Problems in the 1990 Clean Air Act Amendments*, 6 NAT. RESOURCES & ENV'T, Fall 1991, at 40, 40-42.

electric generating stations located mainly in the East and Midwest.¹⁹ The goal is to limit SO₂ emissions to ten million tons below 1980 levels from all sources.²⁰ NO_x emissions are to be reduced to two million tons below 1980 levels.²¹

Title IV should be interesting to nonutility lawyers because of the way the new law works. Instead of imposing emissions limits through permits, which is the way pollution laws traditionally work, Title IV uses market-based "air emissions trading," a potentially exciting idea in environmental regulation. Under the new law, industrial sources will receive "allowances" to emit SO₂ based on their past fossil fuel consumption and the emissions rate allowed.²² An "allowance" is an authorization to emit one ton of SO₂.²³ The allowances can be "spent" by businesses to cover current emissions, saved in an allowance "bank" for future use, or sold to other businesses within the same general geographic area. Companies can earn extra allowances by undertaking conservation measures, switching their processes, or shutting down a facility to reduce overall air emissions below the legal limits.²⁴ The idea behind emissions trading is to reward companies that burn clean fuel or use efficient control technology, or that otherwise "overcontrol," by enabling them to sell some of their allowances to other companies. Also, by purchasing or saving allowances, companies can plan for growth and expand their operations. The companies can implement control options that are the most cost-effective and feasible and may choose, within limits, their own compliance schedule.²⁵

19. The National Acid Precipitation Assessment Program, established by Congress in 1980 to conduct a study of acid rain and its relation to sulfur dioxide and nitrogen oxide, has found that electric utility coal-fired generating plants generate 70% of the 23 million tons of sulfur dioxide emissions in the United States. About 2% of the utility plants account for 68% of the total. See James A. Holtkamp, *EPA Issues Emissions Allowances*, NAT'L L.J., May 13, 1991, at 19, col. 4.

20. 42 U.S.C.A. § 7651(b) (West Supp. 1991).

21. *Id.*

22. *Id.* § 7651c(a).

23. *Id.* § 7651a(3).

24. Indiana law already provides for emission "offsets" in nonattainment areas, so the Title IV approach to SO₂ emissions is not entirely novel. See IND. ADMIN. CODE tit. 326, r. 2-3-1 to -3 (Supp. 1991). Certain Title IV features, such as the requirement that EPA establish an allowance auction system, are new, however, and are worth watching to see how well they help companies achieve compliance while managing their resources.

25. The biggest SO₂ polluters must comply with Phase I of the new Title IV emission limits by 1995. 42 U.S.C.A. § 7651c(a) (West Supp. 1991). In Phase II, which begins in the year 2000, the emissions limits will get even tighter on big polluters and limits will also be imposed on smaller, cleaner plants. The goal is to reduce national SO₂ emissions to 8.9 million tons per year, *id.* § 7651b(a), although "bonus allowances" permitting extra emissions may be granted to companies in states with low SO₂ levels to

C. Air Toxics

Of all the Clean Air Act titles, Title III may have the most profound financial and environmental impact. In Title III, Congress listed 189 ubiquitous industrial chemicals that it considered especially dangerous and declared that companies emitting these air toxics must adopt tough new pollution control technologies.²⁶ The 189 chemicals are produced or used by small businesses as well as big ones. Tens of thousands of companies not traditionally heavily regulated, such as dry cleaners, body shops, paint shops, printers, and even bakeries, eventually will be required to change their processes or substitute new materials, or they will be required to install expensive new emissions controls.

The emissions limits will be achieved in two phases. First, "major" air pollution sources²⁷ will be required to install state of the art air pollution control equipment (or switch to less polluting processes or materials) known as the Maximum Achievable Control Technology (MACT).²⁸ MACT is the type of control needed to attain the emissions reductions deemed achievable by EPA considering, among other things, the cost of achieving the reduction, energy costs, and any non-air quality and environmental impacts that the new technology may have.²⁹ Second, EPA will be required to examine the residual risks remaining after the new control technologies are in place. Significant health risks could

accommodate growth or to companies that have experienced increased use in the last five years. *Id.* § 7651b(a)(1).

26. *Id.* § 7412(b)(1), (c)(2).

27. A "major" source can actually be a small company and is defined as any stationary source (or group of sources) within a contiguous area and subject to common control with the potential to emit (considering pollution controls) 10 tons per year of a single listed pollutant or 25 tons per year of any combination of listed pollutants. *Id.* § 7412(a)(1). Prior to Title III, the Clean Air Act focused on truly major air pollution sources capable of emitting more than 100 tons per year. The new definition of "major" sources illustrates the switch in the federal government's focus from big business to small business.

28. *Id.* § 7412(d)(2).

29. *Id.* For new major sources, MACT shall be deemed to be no less stringent than the emission control that actually has been achieved by the best controlled similar air pollution source in the same category of business. *Id.* § 7412(d)(3). For existing major sources, MACT shall be deemed to be no less stringent than: (a) the average emissions limit achieved by the best performing 12% of the existing sources in the same category of business (for categories having 30 or more air pollution sources) or (b) the average emissions limit achieved by the best performing five sources (for categories with fewer than 30 sources). *Id.*

Minor or "area" sources, i.e., sources that emit less than the 10/25 tons per year threshold, will also have to cut back on emissions to attain "Generally Achievable Control Technologies," or GACT, although EPA retains the discretion to impose stricter MACT standards. *Id.* § 7412(d)(5).

remain even after full implementation of the MACT standards and may warrant tighter controls. If so, EPA must develop stringent health-based limits on the 189 air pollutants to protect public health with an ample margin of safety.³⁰

Once MACT standards are promulgated, existing sources emitting air toxics will have three years to achieve the emission limitations. The first forty categories of sources to come under regulation, whose MACT standards are scheduled to be announced in November 1992, must comply by November 1995.³¹ New sources, ones on which construction or reconstruction³² commenced after the adoption of a MACT standard applicable to the source, must comply before beginning operations.³³ However, new sources beginning construction or reconstruction after a MACT standard is proposed, but before the standard is finally promulgated, get a break. Congress sought to avoid unfair surprises caused by the unexpected promulgation of a final standard that is stricter than the proposed standard. Businesses caught in this position will have the full three years after the date of promulgation to comply, but only if the source complies with the proposed standard during the three-year period.³⁴

The general rule, that a new air toxics source must comply with MACT immediately and that an existing source must comply within three years from the date the applicable standard is promulgated, is subject to a number of exceptions. Companies planning their air toxics compliance strategy should be aware of the opportunities the exceptions create.

30. *Id.* § 7412(f)(2)(A).

31. *Id.* § 7412(i)(3)(A).

32. Title III does not define "reconstruction." Presumably, EPA's historic definition will apply. That definition requires that a reconstructed source comply with new source rules if the cost of reconstruction exceeds one half of the fixed capital cost of constructing an entirely new source. See 40 C.F.R. §§ 51.301, 60.15, 60.383 (1991).

33. 42 U.S.C.A. § 7412(i)(1) (West Supp. 1991).

34. The new source exception does not take into account the fact that the design and financing for a project usually is completed long before construction commences. Thus, if a project is conceived, planned, and designed before any new emission standard is proposed, and construction on the project begins after an emission standard is proposed, and the final rule is as strict as the proposed one, the new source must comply right away even if compliance requires a complete revision of the construction design. Also, the three-year extension has been criticized on the ground that it does not account for long-term construction projects that may begin long before a proposed emission standard and which cannot be completed until after the final standard is promulgated. Those sources will be treated as an existing source and must comply within three years of final promulgation of the emission standard, even though compliance may require interrupting construction to redesign the project so it can meet the compliance deadline.

First: Under EPA's proposed "early reductions program," an existing source which demonstrates that it has achieved a ninety percent or more reduction³⁵ in emissions of hazardous air pollutants (ninety-five percent for particulates) will be issued a permit by EPA that allows the source to meet an alternative emissions limit provided that the emission reduction was achieved prior to proposal of the MACT standard.³⁶ EPA is strongly promoting this program. In the preamble to the proposed rules explaining how the program would work, EPA emphasized that companies "can realize benefits from participating in the early reduction program by obtaining more time to develop strategies for compliance with MACT standards" and by being able to choose the means by which they reduce their air toxics emissions.³⁷

EPA proposed a flexible definition of the term "source" for purposes of the early reduction option. A "source" may be less than the entire company and may consist only of certain smokestacks, vents, storage tanks, or other emission points, provided that the emission points have some functional or geographical relationship to one another.³⁸ A company that can make a ninety percent reduction in emissions from some logical grouping of emission points could be eligible for a six year compliance extension as to that "source," even though the company has not cut total facility emissions by ninety percent.³⁹

A company cannot, however, reduce its air toxics by ninety percent or more while still emitting comparatively undiminished quantities of so-called "high risk" pollutants, such as benzene, asbestos, dioxins, and furans. EPA proposed a list of thirty-five such high risk air toxics.⁴⁰ Companies that achieve a ninety percent or more reduction in overall air toxics will have to show that the ninety percent reduction also applies to any high risk chemicals the company may be emitting.⁴¹ The high

35. The voluntary reduction must be based on verifiable and actual emissions in a base year. 42 U.S.C.A. § 7412(i)(5)(C) (West Supp. 1991). In most cases, the base year will be 1987 unless emissions that year were artificially or substantially greater than emissions in other years prior to implementation of emissions reduction measures. *Id.* In other words, the base year emissions should represent, as accurately as possible, actual emissions during a normal year of operation.

36. *Id.* § 7412(i)(5)(A). For the first 40 categories of sources, for which MACT is scheduled to be promulgated by November 1992, the deadline for achieving the 90% voluntary reduction may already have lapsed by the time this Article is published. *Id.* § 7412(i)(5)(B).

37. National Emission Standards for Hazardous Air Pollutants for Source Categories, 56 Fed. Reg. 27,338, 27,339 (1991) (to be codified at 40 C.F.R. § 63).

38. 56 Fed. Reg. 27,338, 27,366 (1991) (to be codified at 40 C.F.R. § 63.73(a)(1)-(5)).

39. *Id.* at 27,365 (to be codified at 40 C.F.R. § 63.72(a)).

40. *Id.* at 27,367 (to be codified at 40 C.F.R. § 63.74(e)(4)).

41. *Id.* at 27,366-67 (to be codified at 40 C.F.R. § 63.74(g)).

risk chemicals are weighted according to their carcinogenicity or toxicity. That way, if a company cannot afford to cut all its high risk air toxics by ninety percent, which may be the case when only trace quantities of a high risk chemical are being emitted, the company may be able to offset the shortfall by achieving extra reductions in another air toxic.⁴² The goal is to ensure that companies reduce all their air toxic emissions while allowing offsets of higher risk against lower risk pollutants based on the relative toxicity of the pollutants involved.

Second: An existing source that achieves the voluntary reduction described above *after* proposal of the applicable MACT standard, but *before* January 1, 1994, may be issued the six year alternative emission limit provided the source makes an enforceable commitment to achieve the reduction before proposal of the standard. An "enforceable commitment" means a statement to EPA explaining the company's intent and setting forth how the company will achieve the reductions before January 1, 1994.⁴³ The description of the planned reduction measures does not have to be followed exactly, but the plan must be "in sufficient detail to demonstrate that the source owner or operator has given serious consideration to real emission reduction measures."⁴⁴

Third: As discussed above, a new source that begins construction or reconstruction after an applicable MACT standard is proposed, but before the standard is promulgated, is not required to comply with the promulgated standard until three years after the date of promulgation, provided that the proposed standard is met during the three year extension.⁴⁵ The promulgated standard must be more stringent than the proposed standard.⁴⁶

42. The weighting factors specify the equivalent offsets for trading among the listed carcinogens. Consider, for example, the example given in the preamble to EPA's proposed early reduction program rule of a source emitting one ton of hydrazine, with a weighting factor of 100, that wishes to participate in the program but cannot achieve a full 90% reduction in hydrazine emissions. Under the proposed system, the source has the option of offsetting this shortfall by achieving greater than necessary reductions of another air toxic. If the actual hydrazine reduction was 0.8 tons (80%) and the source also emitted 40 tons of benzene, the hydrazine shortfall of 0.1 ton (the difference between the actual reduction and 90%) could be offset by reductions in benzene of 0.1 ton X 100/10 (the ratio of the weighting factors for hydrazine and benzene), or 1.0 ton. In other words, it would take an additional one-ton reduction in benzene emissions to offset the inability to reduce the hydrazine emissions by an extra 0.1 ton, and it would take 10 tons of additional reductions of an air toxic with a weighting factor of 1 to offset the 0.1 ton shortfall in hydrazine reductions. See 56 Fed. Reg. 27,338, 27,335 (1991).

43. 56 Fed. Reg. 27,338, 27,368 (1991) (to be codified at 40 C.F.R. § 63.75(a)(b)(iv)).

44. 56 Fed. Reg. 27,339, 27,356-27,357 (1991).

45. See *supra* note 34 and accompanying text.

46. 42 U.S.C.A. § 7412(i)(2)(A) (West Supp. 1991).

Fourth: If an existing source has installed pollution control equipment complying with the Clean Air Act's Best Available Control Technology (BACT) requirements⁴⁷ or the technology required to meet the Lowest Achievable Emission Rate (LAER),⁴⁸ then the source's compliance date is extended for five years from the date on which BACT or LAER was installed or the reductions achieved.⁴⁹ This exemption acknowledges that BACT and LAER result in substantial emission reductions and that immediately requiring any additional reductions would be unfair.

Fifth: The President may exempt any stationary source from any standard or limit if he concludes that the necessary technology is not available and it is in the interest of national security to grant the exemption.⁵⁰ This exemption may be for one or more periods of no more than two years each. Each such exemption must be reported to Congress.

Sixth: EPA or a state may issue a permit that grants a one year extension if the extension is necessary for the installation of controls.⁵¹

Seventh: If EPA fails to promulgate a MACT standard for more than eighteen months after the deadline for the standard, then Title III's "hammer provisions" will be triggered.⁵² Each source in the designated category must stop emitting air toxics unless it or the state or local air pollution authorities establish a site-specific standard in a permit application.⁵³ This statutory "hammer" is designed to minimize the possibility that EPA will fail to meet the established deadlines. The permit issued must contain emission limits that are determined to be equivalent to the technology-based standards that EPA would have applied had it met its deadline or a standard reflecting a ninety percent reduction in emissions (ninety-five percent for particulates).⁵⁴

Title III addresses a number of other pollution issues. For example, Title III requires EPA to promulgate a list of 100 substances that are

47. BACT is part of the Clean Air Act's Prevention of Significant Deterioration program. *Id.* § 7479(3).

48. 42 U.S.C. § 7501(3) (1988). LAER also applies to new pollution sources in regions that have not achieved national ambient air quality standards. 42 U.S.C.A. § 7412(d)(3)(A) (West Supp. 1991).

49. *Id.* § 7412(i)(6).

50. *Id.* § 7412(i)(4).

51. *Id.* § 7412(i)(3)(B).

52. *Id.* § 7412(j)(2).

53. *Id.*

54. The failure by EPA to promulgate a standard on time is not treated in Title III as a compliance deadline exemption, but the effect is the same. The compliance deadline extends from three years after the deadline for promulgation of a standard to up to three years after the date of permit issuance, which gives a source an extra 18 months to comply. *Id.* § 7412(j)(5).

expected or reasonably may be anticipated to cause death, injury, or serious adverse effects to humans or the environment.⁵⁵ At the same time, EPA must establish a "threshold quantity" for each listed substance.⁵⁶ Companies with more than a threshold quantity eventually will have to prepare and implement a risk management plan to prevent accidental releases.⁵⁷ The list of 100 substances is scheduled to be promulgated by November, 1992, and the rules explaining what a risk management plan must contain are scheduled to be promulgated by November, 1993.⁵⁸ Companies will have three years from that date to write their plans and register them with EPA and the Indiana Department of Environmental Management (IDEM) by November 1996.⁵⁹

D. Air Permits

Among the most controversial parts of the Clean Air Act Amendments are the Title V requirements for states to develop new programs for issuing operating permits to major stationary air pollution sources, including sources emitting air toxics under Title III.⁶⁰ The goal is to streamline and simplify air pollution control and to give EPA a greater role in monitoring and enforcing compliance efforts.⁶¹ EPA praises Title V for vastly clarifying what will be expected of each air permittee, which should translate into better compliance. Critics, however, warn that the program is too ambitious and will swamp EPA and state regulators in paperwork.⁶² Industry groups have complained that the new system will be doubly bureaucratic because permit applications and revisions now must be reviewed at the state and federal levels.⁶³ Environmental groups

55. *Id.* § 7412(r)(3).

56. *Id.* § 7412(r)(5).

57. *Id.* § 7412(r)(7)(B)(ii).

58. *Id.*

59. *Id.* § 7412(r)(7)(B)(iii).

60. *Id.* §§ 7661-7661f

61. Instead of having to look among numerous provisions of state and federal regulations for applicable emission limits and monitoring, recordkeeping, and reporting requirements, each company's obligations will be embraced in a single permit. In Indiana, this means sources generally will have longer, more detailed air permits than under the former Clean Air Act.

62. See Francis S. Blake & Shannon S. Wagner, *CAA Permit Plan Requires Flexibility*, ENVTL. PROTECTION, March 1991, at 20, 24.

63. States will continue to have responsibility for developing State Implementation Plans (SIPs) which will define the overall strategy in each state for achieving national ambient air quality standards. 42 U.S.C. § 7407(a) (1988). Under Title V, all applicable requirements of a SIP will be embodied in the operating permit of each source, which will be enforceable by the state and by EPA. 42 U.S.C.A. § 7661c(a) (West Supp. 1991). This means that whenever the SIP changes, a change may be required in a source's permit and vice versa. Blake & Wagner, *supra* note 62, at 20.

complain that the requirement for states to act on complete permit applications within eighteen months may be too short to provide meaningful review and public input.⁶⁴

As of this writing, conflicts in and out of government over Title V, and in particular over the amount of public comment that should be allowed on permit applications, have deadlocked EPA's ability to draft implementing rules. So far, EPA has issued only a proposed air permit rule even though the final rule was to have been promulgated by November 1991.⁶⁵ The delay has worried state officials who are required by statute to submit their proposed permit programs to EPA for review by November 1993.⁶⁶ Once a state's program is approved, air pollution sources have one year to file their permit applications.⁶⁷ Because virtually everyone subject to an air pollution emissions limit will be required to apply for a permit, including small business "area" sources that emit air toxics controlled under Title III, EPA has proposed deferring coverage of all "non-major" sources for five years from the date a state's permit program receives EPA approval.⁶⁸

For industry, one of Title V's interesting features is the new air pollution "permit shield."⁶⁹ This provision establishes that a permit shall be the comprehensive statement of the permittee's obligations under the Clean Air Act.⁷⁰ The permittee need look no further than the permit itself to know what is expected. Permit compliance will protect the permittee from enforcement of Clean Air Act requirements, provided that the permit addresses those requirements.

EPA seems to favor the permit shield and wants to use the device to help stabilize the permit process and give greater certainty to the regulated community. EPA's proposed rule, however, could limit the effectiveness of the shield. For example, the proposed rule provides for reopening a permit for cause, such as when a "material mistake" has been made in establishing emissions limits or other requirements of the

64. See *Air Pollution: Focus Turns to Clean Air Regulations*, Env't Rep. (BNA) at 5-5 (Jan. 16, 1992).

65. 56 Fed. Reg. 21,712 (1991) (to be codified at 40 C.F.R. § 70).

66. 42 U.S.C.A. § 7661a(d)(1) (West Supp. 1991).

67. *Id.* § 7661a(c).

68. 56 Fed. Reg. 21,712, 21,770 (1991) (to be codified at 40 C.F.R. § 70.3(b)(1)). Non-major sources in nonattainment areas, however, must seek a permit within one year after a state's program is approved, unless the state makes a showing that deferral of the permit will not hinder the state's ability to meet its obligations under the Clean Air Act. *Id.* (to be codified at 40 C.F.R. § 70.3(b)(2)).

69. The permit shield provision, 42 U.S.C.A. § 7661c(f) (West Supp. 1991), is modeled on similar "shield" authorities under the Resource Conservation & Recovery Act, 40 C.F.R. § 270.4(a) (1991), and the Clean Water Act, 33 U.S.C. § 1342(k) (1988).

70. 42 U.S.C.A. § 7671c(f) (West Supp. 1991).

permit,⁷¹ when EPA determines that the permit must be revised to assure compliance with the Clean Air Act,⁷² or when a "substantial error" has been made in permit processing or data submittal whose correction cannot wait until renewal.⁷³ Moreover, EPA suggested in the preamble to the new rule that the permit shield must be expressly invoked in a Title V permit and does not automatically apply.⁷⁴ EPA also stated that "if any applicable requirements were omitted from the permit during the permit issuance process (i.e., not addressed as opposed to misinterpreted), the source will not be shielded from enforcement of those requirements."⁷⁵

II. SOLID AND HAZARDOUS WASTE

A major legislative initiative focuses on decreasing or eliminating the flow of out-of-state solid waste into Indiana landfills. Indiana enacted new measures imposing fees on out-of-state waste,⁷⁶ requiring waste facility operators to show "good character" before getting a permit,⁷⁷ restricting vehicles used to transport waste from backhauling most types of non-waste cargo,⁷⁸ and requiring brokers, transfer station managers, and transporters of out-of-state waste to post a surety bond and consent to appointment of the Indiana Secretary of State as agent for purposes of service of process.⁷⁹ The Indiana General Assembly also enacted a variety of measures to supplement the far-reaching solid waste planning scheme created in 1990, including restricting membership on Indiana's new solid waste management advisory committees to persons unconnected to the solid waste management industry.⁸⁰

Not all the recent laws have survived judicial scrutiny. One court dealing with out-of-state waste held that Indiana's initial effort to impose differential fees on imported waste violated the Commerce Clause of the United States Constitution.⁸¹ Meanwhile, the Indiana "good character" statute, which requires solid or hazardous waste permit applicants and related persons or affiliates to submit an elaborate array of information to the Indiana Department of Environmental Management (IDEM),

71. 56 Fed. Reg. 21,712, 21,778 (1991) (to be codified at 40 C.F.R. § 70.7(g)(iii)).

72. *Id.* (to be codified at 40 C.F.R. § 70.7(g)(iv)).

73. *Id.* at 21,744.

74. *Id.*

75. *Id.*

76. IND. CODE § 13-9.5-5-1 (Supp. 1991).

77. *Id.* §§ 13-7-10.2-1 to -8.

78. *Id.* § 13-7-31-13.1.

79. *Id.* § 13-7-10.5-15.

80. *Id.* §§ 6-2.1-3-33, 13-9.5-2-10, 13-9.5-3-4.

81. *Government Suppliers Consol. Servs., Inc. v. Bayh*, 753 F. Supp. 739 (S.D. Ind. 1990).

is under attack in a lawsuit filed in the Marion County Superior Court.⁸²

A. Crackdown On Out-of-State Waste

Indiana's campaign against out-of-state waste is nearly three years old. In October 1989, Governor Evan Bayh and IDEM made the limitation or elimination of out-of-state waste a top priority.⁸³ In 1990, the General Assembly responded to the Governor's call for new legislation and enacted House Enrolled Act 1240 which places special requirements on waste originating from outside Indiana.⁸⁴ The law required transporters of solid waste from out-of-state to certify where the waste came from,⁸⁵ to provide certificates from health officials in the state of origin stating whether the waste shipment contained any hazardous waste,⁸⁶ and to impose extra charges on the shipments.⁸⁷

The new law promptly came under attack as an infringement of the Commerce Clause of the United States Constitution.⁸⁸ In *Government Suppliers Consolidating Services, Inc. v. Bayh*,⁸⁹ Judge John D. Tinder of the United States District Court for the Southern District of Indiana struck down the challenged provisions and permanently enjoined the state from enforcing the requirements.⁹⁰ The court noted speeches by Governor Bayh requesting legislation to stop "the tidal wave of out-of-state trash" allegedly threatening the state, as well as published statements by IDEM's commissioner concerning the "recently accelerated influx of out-of-state waste into Indiana" and warning that "[w]e cannot allow Indiana to become the dumping ground for the nation's garbage."⁹¹ Those statements, among other factors, convinced the court that Indiana

82. *Chemical Waste Management of Ind., Inc. v. IDEM*, No. 49D0129201-CP-0009 (filed Jan. 6, 1992). The lawsuit challenges the retroactive application of the disclosure requirements to pending permit applications under IND. CODE § 13-7-10.2-3(b) (Supp. 1991). At the time of this writing, plaintiff's motion for summary judgment was pending before the court.

83. The limited capacity of Indiana's existing landfills, the rapid changes in the solid waste handling and disposal industry, and the defects in Indiana's existing laws and regulations governing the transportation, processing, and disposal of solid waste require a comprehensive review of Indiana's laws regulating solid waste and Indiana's plans for managing its solid waste for years to come. Exec. Order No. 89-17 (Nov. 9, 1989) (on file with the author).

84. Pub. L. No. 10-1990 (1990).

85. IND. CODE § 13-7-22-2.7(c)(9) (Supp. 1991).

86. *Id.* § 13-7-22-2.7(c)(2).

87. *Id.* § 13-9.5-5-1.

88. The Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3.

89. 753 F. Supp. 739 (S.D. Ind. 1991).

90. *Id.* at 766-80.

91. *Id.* at 746-47.

officials responsible for setting the state's solid waste policy shared "an objective of limiting, or perhaps eliminating, the deposition of out-of-state trash in Indiana."⁹²

The court noted, however, that mere bias against interstate shipments of trash, which since 1978 have been held by the United States Supreme Court to be an article in commerce subject to Commerce Clause protection,⁹³ does not necessarily violate the Constitution because improper motives cannot invalidate an otherwise valid law.⁹⁴ The court also accepted the state's position that the extra fee on out-of-state trash shipments and the health certificate requirement advanced legitimate local interests, such as promoting the health and safety of the people, prolonging the life of Indiana's landfills, and reducing the amount of infectious or hazardous waste illegally dumped into sanitary landfills.⁹⁵ Yet, the court was troubled by the state's decision to consistently burden waste from out-of-state, rather than pursue its asserted goals through nondiscriminatory means.⁹⁶ For example, the state could have imposed fees on in-state and out-of-state trash and just as effectively stemmed the flow of waste into scarce landfill space. The state could have required health officer certificates for in-state and out-of-state trash and just as effectively established that waste loads were free from hazardous wastes.⁹⁷ Judge Tinder added that "[h]owever noble and popular" the challenged statutes seemed to be, they had to give way to constitutional limits on legislation opposing interstate commerce.⁹⁸ The court concluded by stating:

The same protection that the commerce clause gives to the citizens of other states who feel the need to import waste into Indiana protects Indiana citizens when they export hazardous waste to other states. Those provisions will protect future generations of Hoosiers should they find the need to export even solid municipal waste to another state.⁹⁹

In the wake of Judge Tinder's decision, the Indiana General Assembly sought to cure the constitutional defects in a new set of laws opposing

92. *Id.* at 767.

93. *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

94. *Government Suppliers Consol. Servs., Inc. v. Bayh*, 753 F. Supp. 739, 767-68 (S.D. Ind. 1991).

95. *Id.* at 767.

96. *Id.* at 774.

97. The court held that the requirement of Indiana Code § 13-7-22-2.7(c)(1), that trash haulers identify the county or state where trash loads originated, advanced no plausible legitimate interest at all, or did so only slightly, and did not justify its excessive burden on interstate commerce. *Id.* at 776-77.

98. *Id.* at 780.

99. *Id.*

out-of-state waste. House Enrolled Act 1585 imposes a special fee on out-of-state wastes, but the fee will be no more than necessary to offset extra costs incurred in Indiana due to the importation of the waste.¹⁰⁰ The fee, approximately two dollars per ton of waste, will be distributed to local government units and to the state hazardous substances response trust fund.¹⁰¹ House Enrolled Act 1716 revised the unconstitutional hauler certification requirements by providing that the certification shall be based on weight, not volume, and need not be made under oath or affirmation subject to penalties for perjury.¹⁰² The hauler certificates must be retained for one year by the disposal facility operator, and the operator must inform IDEM quarterly of the origin of the incoming waste.¹⁰³ Although the new laws may resolve some of Judge Tinder's criticisms,¹⁰⁴ the plaintiffs in *Government Suppliers* are now challenging the new laws in another lawsuit in the district court and are raising fresh Commerce Clause objections.¹⁰⁵

Meanwhile, Indiana courts have confronted out-of-state trash in a different context. In *National Salvage & Service Corp. v. Commissioner of IDEM*,¹⁰⁶ the Indiana Court of Appeals upheld a permanent injunction against an Indianapolis business engaged in unloading shipments of baled solid waste from train cars to trucks.¹⁰⁷ The rail shipments of waste originated from out of state. IDEM sued to enjoin the business¹⁰⁸ on the ground that the defendant's off-loading operation was a "solid waste

100. IND. CODE § 13-9.5-5-1(b) (Supp. 1991).

101. *Id.* § 13-9.5-5-1(c).

102. *Id.* § 13-7-22-2.7(c).

103. *Id.*

104. For example, House Enrolled Act 1240 does not require differential fees charged on out-of-state waste to be directed toward eliminating hazardous wastes from sanitary landfills. The new law expressly provides that some or all of the out-of-state waste fees can go to the state's hazardous substances response trust fund. *Id.* § 13-9.5-5-1(c).

105. *Government Suppliers Consol. Servs., Inc. v. Bayh*, No. IP 91-899 (S.D. Ind. 1991). On February 5, 1992, Judge Larry J. McKinney of the United States District Court for the Southern District of Indiana held one provision of the challenged laws, Indiana Code § 13-7-10.5-15(1), which requires out-of-state waste operators to post a surety bond with the Indiana Secretary of State, to be in violation of the Commerce Clause. Judge McKinney upheld all other challenged provisions at issue in the lawsuit. On February 10, 1992, the Seventh Circuit granted plaintiffs' request for an injunction pending appeal against the enforcement of the challenged statutes. Oral arguments in the case were scheduled for April 27. *See Order by the Seventh Circuit*, No. 92-1318 (Feb. 10, 1992).

106. 571 N.E.2d 548 (Ind. Ct. App. 1991).

107. *Id.* at 559.

108. IDEM's complaint was brought pursuant to Indiana Code § 13-7-5-7, which empowers the IDEM commissioner to proceed in court to procure compliance with Indiana's environmental statutes and rules, and § 13-7-12-2, which empowers the commissioner to seek injunctions against any pollution source which presents an "imminent and substantial endangerment" to the health or livelihood of persons.

facility” that required a permit under IDEM’s solid waste rules.¹⁰⁹

The court of appeals agreed that a permit was needed, but not for the reasons IDEM gave. Instead of finding the business to be a “solid waste facility,”¹¹⁰ the court held that it was a “transfer station”¹¹¹ and qualified as a “solid waste processing facility”¹¹² for which IDEM’s rules required a permit, even though IDEM repeatedly had taken the position that the “transfer station” definition did not apply. In construing “transfer station,” the court did not discuss IDEM’s construction of the term, but instead relied upon a new Indiana statute, enacted after the onset of the litigation, which for the first time statutorily defined “transfer station” to mean “a facility where solid waste is transferred from a vehicle or container to another vehicle or container for transportation.”¹¹³ The court of appeals stated that the new statute was a clarification of existing law, not a substantive change.¹¹⁴ The court held that it could use the legislature’s “clarification” to ascertain the “legislative intent” of the IDEM rule defining “transfer station.”¹¹⁵ Thus, the court adopted the statutory definition as the proper construction of the term.

The court of appeals held that the ambiguities it detected in IDEM’s rules do not render the rules unconstitutionally vague.¹¹⁶ The court

109. See IND. ADMIN. CODE tit. 329, r. 2-2-1(b)(53) (Supp. 1991) (defining solid waste facility); *id.* r. 2-2-1(b)(41) (defining processing). IDEM read these two rules in combination and concluded that National Salvage was a solid waste processing facility for which a permit is required. *National Salvage & Servs. Corp. v. Commissioner of IDEM*, 571 N.E.2d 548, 554 (Ind. Ct. App. 1991).

110. The term “solid waste facility” is defined in IDEM’s rules as a “solid waste facility in or upon the land into which solid waste is disposed.” IND. ADMIN. CODE tit. 329 r. 2-2-1(b)(54) (Supp. 1991). There are three types of solid waste land disposal facilities: (1) construction/demolition sites; (2) restricted waste sites; and (3) sanitary landfills. *Id.* The court of appeals held that none of National Salvage’s activities fell within these defined categories of disposal facilities. *National Salvage*, 571 N.E.2d at 554.

111. A “transfer station” is a facility “at which solid waste is transferred into larger capacity vehicles.” IND. ADMIN. CODE tit. 329 r. 2-2-1(b)(58) (Supp. 1991). The unloading of baled waste from rail cars onto trucks involves moving waste into smaller capacity vehicles, and IDEM acknowledged that National Salvage could not be a transfer station for that reason. *National Salvage*, 571 N.E.2d at 554-55.

112. See IND. ADMIN. CODE tit. 329 r. 2-2-1(b)(55) (Supp. 1991) (defining “solid waste processing facility” as a solid waste facility upon which is located at a: (1) solid waste incinerator; (2) transfer station; (3) solid waste baler; (4) solid waste shredder; (5) resource recovery system; (6) composting facility; or (7) garbage grinding facility).

113. IND. CODE § 13-7-1-24.5 (Supp. 1991).

114. The statutory definition of “transfer station” was included in Public Law 19-1990, which expressly stated at § 41 that the definition clarified existing law. Act of Mar. 20, 1990, Pub. L. No. 19-1990, § 41.

115. *National Salvage & Serv. Corp. v. Commissioner of IDEM*, 571 N.E.2d 548, 555 (Ind. Ct. App. 1991).

116. *Id.* at 556.

characterized IDEM's permit requirements as an "economic regulation," for which crystal clarity is not essential, despite the substantial civil penalties sought by IDEM against National Salvage and the fact that criminal penalties also are provided by statute.¹¹⁷ National Salvage petitioned for transfer of the case to the Indiana Supreme Court. The supreme court heard scheduled oral arguments in the case in March and voted 3-2 to deny transfer. A petition for certiorari to the United States Supreme Court was under consideration as of this writing.

Indiana's campaign against out-of-state waste is filling Title 13 of the Indiana Code with new provisions and is imposing burdens on small waste companies. Every vehicle hauling municipal waste now must be registered with IDEM.¹¹⁸ Waste haulers cannot use a new trash truck until it is registered with IDEM.¹¹⁹ Each solid waste transporter, broker, and transfer station must submit "good character" disclosures and receive an acknowledgement number to be able to operate.¹²⁰ Waste tire handlers must now ensure that they obtain proper prior approvals before they transport, cut up, or store waste tires.¹²¹ Haulers of solid waste must ensure that they are carrying and must be able to present the correct waste manifests to dispose of their loads.¹²²

Further, waste operators must submit an array of reports to regulators. Monthly special waste reports are required.¹²³ Haulers must provide reports of waste taken out of state¹²⁴ and certificates as to the origin of waste.¹²⁵ In addition, quarterly reports are required by IDEM's scales rule.¹²⁶ The Indiana Department of Revenue and each solid waste management district imposing a tax on solid waste require monthly reports.¹²⁷ Waste tire transporters must submit copies of all manifests to IDEM within thirty days of receipt.¹²⁸ These new and sometimes conflicting and overlapping reporting requirements, manifesting requirements, permits, and registrations have caused big effects on small com-

117. *Id.* at 555.

118. IND. CODE § 13-7-31-8 (Supp. 1991).

119. *Id.* §§ 13-7-31-8.2, -13.3.

120. *Id.* § 13-7-10.5-11.

121. *Id.* § 13-7-23-6.

122. There are separate requirements for special waste manifests, IND. ADMIN. CODE tit. 329, r. 2-21-1 to -16 (Supp. 1991); infectious waste transportation records, *id.* tit. 410, r. 1-3-1 to -29; hauler certifications of origin, IND. CODE § 13-9.5-11-1 (Supp. 1991); municipal waste manifests, *id.* § 13-7-31-12; and waste tire manifests, *id.* § 13-7-23.2-13.

123. IND. ADMIN. CODE tit. 329, r. 2-21-15(c) (Supp. 1991).

124. IND. CODE § 13-9.5-11-2(b) (Supp. 1991).

125. *Id.* § 13-9.5-11-1(a).

126. IND. ADMIN. CODE tit. 329, r. 2-19-6 (Supp. 1991).

127. IND. CODE §§ 13-9.5-5-4(c), 13-9.5-7-3(c) (Supp. 1991).

128. *Id.* § 13-7-23.2-13(f).

panies that must now have at least one additional employee simply to track and follow the paperwork required to operate a waste business.

B. A Resolution to the Out-of-State Waste Issue?

Lawsuits challenging state statutes and rules that discriminate against out-of-state waste have raged in a number of states. The United States Supreme Court may soon delineate the permissible limits of state interference with interstate waste shipments.

Last summer, the Supreme Court of Alabama upheld a 1990 state law placing a base fee of \$25.60 per ton of hazardous waste on all commercial facilities and an extra fee of \$72 per ton on out-of-state hazardous waste and limiting the volume of hazardous waste that may be accepted in any one-year period at any commercial facility.¹²⁹ The only commercial hazardous waste facility in the state is Chemical Waste Management's facility in the city of Emelle. The \$72-per-ton fee was discriminatory on its face,¹³⁰ but the Alabama court held that the Emelle facility played such an important role in the national waste disposal effort that Alabama had a legitimate basis for concern and could permissibly curtail wastes flowing into the state. Meanwhile, the Eleventh Circuit Court of Appeals held that such concerns do not authorize Alabama to enact legislation that discriminates on the basis of the waste's state of origin.¹³¹ The United States Supreme Court has granted certiorari in Chemical Waste Management's appeal from the decision of the Alabama Supreme Court.¹³²

In Indiana, Governor Bayh and New Jersey Governor James Florio agreed last summer to reduce the flow of New Jersey solid waste into Indiana landfills, and a similar agreement was reached with New York Governor Mario Cuomo.¹³³ The out-of-state waste debate may be resolved through negotiations like these before a final solution is reached through litigation.

C. Hazardous Wastes

In the field of hazardous waste, the District Court for the District of Columbia invalidated two 1980 EPA rules that classified hazardous

129. *Guy Hunt v. Chemical Waste Management, Inc.*, 584 So. 2d 1367 (Ala. 1991), *cert. granted*, 112 S. Ct. 964 (1992).

130. Chemical Waste Management also alleged that the base fee of \$25.60 per ton for all waste, regardless of the state of origin, excessively burdened interstate waste shipments even though the fee appeared neutral on its face.

131. *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management*, 910 F.2d 713, 723 (1990), *modified*, 924 F.2d 1001 (11th Cir. 1991).

132. *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 964 (1992).

133. See Julie Sturgeon, *The Out-Of-State Trash Controversy*, INDIANAPOLIS C.E.O., January 1992, at 59-60.

waste as any material that is mixed with or derived from hazardous waste.¹³⁴ The rules prevented industry from evading hazardous waste regulations under the Resource Conservation and Recovery Act (RCRA) by simply mixing their wastes with other materials, but they also led to perverse results. Industry has been forced to handle and dispose of huge quantities of material that are classified as "hazardous" simply because small concentrations of the material were listed as a hazardous waste in EPA's regulations or because the material (such as certain types of incinerator ash) originated through the handling of a listed waste, even though taken as a whole the material is innocuous.

The court of appeals invalidated the "mixture" and "derived from" rules because of defects in EPA's rulemaking procedures.¹³⁵ EPA must publish proposed rules in advance of adoption so the public can read and comment on the agency's actions.¹³⁶ According to the court, the final "mixture" and "derived from" rules diverged too greatly from the proposed versions, which meant that the public did not have adequate notice and opportunity to comment upon the final rules.¹³⁷ EPA has sought reconsideration of the appellate court ruling.¹³⁸

If the decision stands, the hazardous waste field will be considerably narrowed until EPA properly promulgates new rules. Old enforcement actions for certain hazardous waste disposal violations may even be vacated. EPA is seeking clarification from the court that the ruling will apply only prospectively and will not affect judgments already entered involving enforcement of the "mixture" and "derived from" rules.

The effect of the decision in Indiana is unclear. IDEM has promulgated its own "mixture" and "derived from" rules,¹³⁹ presumably in compliance with Indiana's public notice requirements. The basis for these rules was Indiana's understanding that the "mixture" and "derived from" requirements were mandated by RCRA, but this has been cast into doubt. This issue may be litigated the next time IDEM attempts to enforce its "mixture" and "derived from" rules.

134. *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991). The mixture rule provides that if a waste that appears on any of EPA's lists of hazardous wastes is mixed with any solid waste, the resulting mixture is subject to regulation as a hazardous waste, subject to certain exceptions. 40 C.F.R. § 261.3(a)(2) (1991). The "derived from" rule treats as hazardous any waste that results from the treatment, storage, or disposal of a listed hazardous waste, again with certain exceptions. *Id.* § 261.3(c)(2).

135. *Shell Oil Co.*, 950 F.2d at 747.

136. *See* 5 U.S.C. § 553(b) (1988).

137. *Shell Oil Co.*, 950 F.2d at 751.

138. 'Mixture,' 'Derived From' Rules Recommended for Improper Notice, *Env't Rep. (BNA)* at A-6 (Jan. 22, 1992). EPA has also promulgated interim final rules in response to the court's decision, which are indential to its original mixture and derived from rules. *See* 57 Fed. Reg. 7628-01 (1992) (to be codified at 40 C.F.R. pt. 261).

139. IND. ADMIN. CODE tit. 329, r. 3-3-3(a) (Supp. 1991).

III. WATER

One of the most important developments in water pollution control law occurred not in the courtroom, but by way of EPA regulation. On November 16, 1990, EPA issued a final rule regulating the discharge of stormwater under section 402 of the Clean Water Act.¹⁴⁰ The stormwater rules were the subject of much litigation and revision over the seventeen-year period beginning in 1973.

The new rule applies to municipalities of greater than 100,000 in population and certain industries that discharge stormwater either directly into the waters of the United States or into a separate stormwater sewer provided by a municipality.¹⁴¹ These generators of potentially contaminated stormwater are required to submit applications for their continued discharge of stormwater through a National Pollutant Discharge Elimination System (NPDES) permit.¹⁴²

The rule specifically identifies what kind of industrial discharger must obtain a stormwater NPDES permit.¹⁴³ Most of the affected industries are listed in the rule according to their standard industrial code. The rule, however, also applies to construction activity, the mining industry, the transportation industry, landfills, hazardous waste landfills or other treatment or storage facilities, and recycling facilities and electric utilities.¹⁴⁴ Many of these industries need only obtain a stormwater permit if they expose raw materials or finished products to the elements.¹⁴⁵ Other industries, such as lumber and paper mills, petroleum refineries, chemical companies, and steel, iron, or aluminum mills, must obtain a permit even if their raw materials or finished products are not exposed to the elements.¹⁴⁶

The rule also establishes three different permitting schemes by which applicants may obtain stormwater permits.¹⁴⁷ First, applicants can apply for an individual permit if the applicant submits its own information to obtain a permit unique to its facility, much like the kind of NPDES permit industrial dischargers now seek for their process wastewater.¹⁴⁸ This application must be filed by October 1, 1992.¹⁴⁹

140. 40 C.F.R. § 122.26 (1991).

141. *Id.* § 122.26(a)(1).

142. *Id.*

143. *Id.*

144. *Id.* § 122.26(b)(14).

145. *Id.*

146. *Id.*

147. *Id.* § 122.26(c).

148. *Id.* § 122.26(c)(1).

149. *Id.* § 122.26(e)(2).

The rule also provides that industrial dischargers can participate in a group application when the group has common characteristics that will enable EPA to process a core of information common to all of the applicants at the same time.¹⁵⁰ The group application is intended to reduce EPA's administrative burden and to reduce costs by allowing industry to share in sampling, reporting, and permit preparation costs. As of this writing, the deadline for forming a group has passed.¹⁵¹ EPA, however, will still consider an applicant's petition to join an existing group in certain instances.

The third permitting option provided under the rule allows an industrial discharger to file a "notice of intent" to be covered by a general permit instead of seeking either an individual or group permit.¹⁵² EPA or approved states have or soon will promulgate permits by rule that provide certain parameters for like-kind industrial dischargers. Under a general permit, a discharger need not provide initial sampling information to establish discharge limitations unique to its facility.¹⁵³ Limits are already imposed by the general permit. Indiana obtained authorization to issue general permits during the summer of 1991. As of this writing, Indiana is still in the process of promulgating those permits.

Although the stormwater regulation affects only the larger municipalities and certain industries, EPA may extend the regulation to smaller cities and commercial areas in the next few years. Consequently, stormwater permitting will remain a "new topic" for some time to come.

IV. WETLANDS

The development of federal wetlands law has been guided largely by the regulatory activities of four agencies: EPA, the Army Corps of Engineers (Corps), the Soil Conservation Service, and the Fish and Wildlife Service.¹⁵⁴ The Corps derives its power from section 404 of the

150. *Id.* § 122.26(c)(2).

151. *Id.* § 122.26(e)(2)(i) (applications were required to be submitted by Sept. 30, 1991).

152. *Id.* § 122.28.

153. *Id.* § 122.26(c)(2)(i)(D).

154. In Indiana, two state administrative agencies oversee the permitting of wetland alterations: IDEM and the Indiana Department of Natural Resources. IDEM was granted its wetlands permitting authority under the Clean Water Act, 33 U.S.C. § 1341 (1988), which requires that a water quality waiver be granted by the state before the Corps may approve a permit. DNR's wetland protection powers are derived solely from state law and are confined to the review of permits proposing the alteration of the shorelines of lake areas. IND. CODE § 13-2-11.1 (Supp. 1991). DNR plans to locate and map wetland areas on the shorelines of Indiana lakes to provide developers with a ready source of planning information to consult before initiating shoreline development.

Clean Water Act which governs the dredging and filling of wetlands.¹⁵⁵ The Corps administers the section 404 permitting program and is responsible for reviewing permits proposing the filling of protected wetland areas.¹⁵⁶ EPA plays a limited, but potentially powerful, role because of its ability to veto the grant of any Corps permit.¹⁵⁷ The Fish and Wildlife Service is responsible for submitting comments on proposed permits, but has no power to affect the grant or denial of a section 404 permit.¹⁵⁸ Finally, the Soil and Conservation Service derives its wetlands regulatory powers from an entirely different source, the Food Security Act of 1985.¹⁵⁹ The Act provides for the removal of United States Department of Agriculture benefits from farmers who initiate cultivation in wetland areas.¹⁶⁰

The regulation of wetlands revolves around the criteria that the four agencies use to define wetlands. In 1989, the agencies jointly developed *The Federal Manual for Identifying and Delineating Jurisdictional Wetlands* to provide a common scheme for identifying the boundary and extent of wetland areas.¹⁶¹ The Manual relies on three criteria to characterize wetland boundaries: hydrology, vegetation, and soils.¹⁶² Revisions in the Manual proposed last summer could alter the methods used to evaluate each criteria and substantially reduce the number of acres of wetlands protected by federal law.¹⁶³ The revisions would require wetlands to be saturated with water at the surface for a longer period of time and generally require a higher standard of proof of hydrologic characteristics than the prior provisions.¹⁶⁴ Some estimates suggest that the revisions will remove protection from fifty million acres of areas currently defined as wetlands.¹⁶⁵ The comment period for the proposed revisions had just closed as of the writing of this Article, so it is hard to know what standards the final Manual will contain.¹⁶⁶

155. 33 U.S.C. § 1344 (1988).

156. *Id.* § 1344(a).

157. *Id.* § 1344(c).

158. *Id.* § 1344(m).

159. 16 U.S.C. § 3812 (1988).

160. *Id.* § 3811.

161. EPA, ARMY CORPS. OF ENG'S DEP'T OF AGRIC. SOIL CONSERVATION SERV. & DEP'T OF INTERIOR FISH AND WILDLIFE SERV., *THE FEDERAL MANUAL FOR IDENTIFYING & DELINEATING JURISDICTIONAL WETLANDS* (1989).

162. *Id.*

163. 56 Fed. Reg. 40,446 (August 14, 1991).

164. *Id.* at 40,460, 40,463.

165. See *Groups Predict Major Environmental, Economic Harm from 1991 Manual Changes*, Env't Rep. (BNA) at AA-1 (Jan. 17, 1992).

166. The final Manual will be published in Appendix A of 33 C.F.R. § 328 upon promulgation. 56 Fed. Reg. 65,970 (Dec. 19, 1991).

V. SUPERFUND

The nation's Superfund program,¹⁶⁷ pursuant to which EPA has responsibility to clean up the nation's most seriously polluted toxic waste sites, continues to sow environmental litigation. The most interesting development may be EPA's own internal examination of the program to determine whether it is working.

Since the creation of Superfund in 1980, the program has drawn criticism for taking too long and costing too much to identify and clean up targeted sites.¹⁶⁸ In 1991, top level management at EPA announced changes in the program that EPA says will speed up the cleanup process.¹⁶⁹ Specifically, EPA's Office of Solid Waste and Emergency Response has set a goal of tripling the number of completed cleanups by 1993, with a ten-fold increase by the end of the decade.¹⁷⁰ The agency intends to do this by using standardized cleanup technologies for certain sites to eliminate or reduce some of the tasks involved in the evaluation of cleanup alternatives.¹⁷¹ Also, EPA announced that it would more aggressively negotiate with states and other government agencies in disputes that sometimes slow down cleanup work and begin requiring private parties to design remedial work right away instead of waiting until completing protracted negotiations on paying for and carrying out the work.¹⁷²

167. "Superfund" is the short-hand reference to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. §§ 9600-9675 (West Supp. 1991).

168. It takes more than a year on average for EPA to evaluate a site and determine its eligibility for inclusion on the National Priorities List of Superfund sites. It takes more than three years on average to determine the extent of contamination and the options for cleanup. Negotiations with private parties on carrying out the cleanup take about a year, and another year and a half is required to design the specifications of the remedial work and submit the project to contractors for bidding. Carrying out the actual cleanup work takes years longer. Some 1,300 sites are at various stages of the Superfund process. Only 63 have made it all the way through the "completion" stage. See Memorandum from Don R. Clay, EPA Asst. Adm'r, Recommendations for Accelerating Cleanup and Managing Risks at Superfund Sites (July 19, 1991) (on file with author).

169. *Id.*

170. *Id.*

171. The current investigation/remedy selection process takes over three years to complete because each site is treated as a unique problem, requiring preparation of site-specific risk assessments, cleanup levels, and technical solutions. According to EPA, standardization of the process would reduce the time needed before cleanup can start and would also improve consistency in the way sites are treated across the nation. It will take three to six years, however, to develop the regulations, standards, and guidelines for standardizing the remedies.

172. EPA says disputes between EPA, the Department of Justice, the states, and other parties can be a significant source of delay in finalizing records of decision, settlements, and remedial designs, and in starting and completing remedial actions.

One of the more intriguing ideas is to permit private parties with liability at more than one Superfund site to engage in "liability trading" pursuant to which they would undertake the entire cleanup at one site in exchange for a reduction or complete release of liability at the other sites.¹⁷³ EPA also will create a new National Superfund Director to oversee all Superfund spending to prevent money from being wasted on inflated and unnecessary items like business cards, parking fees, and potted plants for EPA contractors.¹⁷⁴

A. Lender Liability

Perhaps the most controversial Superfund case during the survey period was the decision by the Eleventh Circuit Court of Appeals in *United States v. Fleet Factors Corp.*¹⁷⁵ The court held that a secured creditor may incur liability for its debtor's hazardous substance cleanup costs under the statute without having any actual ownership or operational control over the debtor.¹⁷⁶ All that is required is sufficient participation in the debtor's financial management "to a degree indicating capacity to influence" the debtor's hazardous waste activities.¹⁷⁷ Thus, the standard for liability is not whether the secured creditor actually was involved in the debtor's day-to-day operations. A secured creditor may be liable if it merely participated in the debtor's financial management and had sufficient involvement in the debtor's affairs for a court to infer an ability to affect the debtor's hazardous waste disposal decisions.¹⁷⁸

Fleet Factors was shortly followed by a similar holding by the Ninth Circuit Court of Appeals in *In re Bergsoe Metal Corp.*¹⁷⁹ The Ninth Circuit held, however, that "there must be some actual management of the facility" to hold a lender liable.¹⁸⁰

The two decisions caused an uproar in the nation's lending community. Although "owners" and "operators" are among the broad

173. For example, when a party is responsible for \$18 million worth of costs at Site A where a \$20 million remedy is required, and is also responsible for \$1 million worth of costs each at Sites B and C, the party would be allowed to conduct the entire cleanup at Site A in exchange for protection from contribution actions at the other sites. The proposal could be a real transaction cost savings for large waste generators with Superfund exposure at many sites, but it likely will be opposed by businesses that are small waste generators who have liability at only one or a few sites. The small generators stand to absorb a larger share of total Superfund costs.

174. See ADMINISTRATOR'S TASK FORCE, UNITED STATES ENV'T PROTECTION AGENCY, IMPLEMENTATION OF SUPERFUND ALTERNATIVE REMEDIAL CONTRACTING STRATEGY (1991).

175. 901 F.2d 1550 (11th Cir. 1990).

176. *Id.* at 1554-55.

177. *Id.* at 1557.

178. *Id.*

179. 910 F.2d 668 (9th Cir. 1990).

180. *Id.* at 672.

classes of responsible parties that are liable for the costs of cleaning up hazardous substances, the law exempts from the owners and operators group a person "who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest."¹⁸¹ Lenders complained that the *Fleet Factors* and *Bergsoe* decisions gutted this secured lender exemption.

The tempest has since cooled in light of EPA's clarification that it will not enforce the Superfund law against lenders who act to protect their interest in property by undertaking a financial workout with a borrower by periodically monitoring the borrower's business; conducting on-site inspections and audits; requiring certification of financial information or compliance with applicable duties, laws, or regulations; or by taking other steps to protect their interest in property serving as collateral for a loan.¹⁸² Such actions, including foreclosing and liquidating the secured property, generally will not be considered to be participation in the management of a facility provided that the actions taken are necessary to protect the security interest and provided that the lender within twelve months following a foreclosure sells or advertises the sale of the subject property and does not, following six months of foreclosure, reject any written bona fide offers of fair consideration for the property.¹⁸³

Indiana has a "mini-Superfund" statute¹⁸⁴ that partially tracks the federal law, but until the *Fleet Factors* decision, the law did not contain any express secured lender exemption.¹⁸⁵ It does now.¹⁸⁶ The Indiana General Assembly has made clear during the survey period that persons who have an interest in a facility to secure an extension of credit or who hold title to property due to a borrower's default, will not have liability under the mini-Superfund law unless the creditor exercised actual and direct managerial control over the use, generation, treatment, storage, or disposal of the hazardous substances in question.¹⁸⁷

B. Bankruptcy and Superfund

Environmental cleanup costs often are so oppressive that parties held liable for such costs seek refuge in the Bankruptcy Code. In such cases,

181. 42 U.S.C. § 9601(20)(A) (West Supp. 1991).

182. See National Oil & Hazardous Substances Pollution Contingency Plan; Lender Liability Under CERCLA, 56 Fed. Reg. 28,798 (1991) (to be codified at 40 C.F.R. § 300).

183. *Id.* at 28,809 (to be codified at 40 C.F.R. § 300.1100(b)(7)(ii)(B)).

184. IND. CODE §§ 13-7-8.7-1 to -13 (1988 & Supp. 1991).

185. Instead, the Indiana statute provides simply that persons liable under CERCLA shall be equally liable under the state law in the same manner and to the same extent. *Id.* § 13-7-8.7-8.

186. *Id.*

187. *Id.* § 13-7-8.7-8(e).

the bankruptcy objective of creating a "fresh start" for the debtor collides head-on with the environmental goal of cleaning up contaminated sites quickly and at private expense. By definition, the bankruptcy estate does not have enough money to pay everyone's legitimate claims, so the issue becomes who gets stuck with the loss. Some courts have held that environmental claims must be satisfied in full, even if that means harming innocent creditors, even secured ones.¹⁸⁸

In *In re Chateaugay Corp.*,¹⁸⁹ the Second Circuit Court of Appeals took a different approach and ruled that environmental interests do not inevitably preempt the nonenvironmental objectives of bankruptcy law.¹⁹⁰ The court held, among other things, that Superfund response costs for environmental contamination arising from pre-petition releases or threatened releases of hazardous substances were "claims" under the Bankruptcy Code that could be discharged like any other claim.¹⁹¹ The case concerned EPA's efforts to recover cleanup costs at fourteen sites where the debtor had been identified as a potentially responsible party. Only one of the fourteen sites had been remediated to the point where EPA could estimate its claim, which was around thirty-two million dollars. Cleanup costs at the other sites, which did not necessarily represent all the sites where the debtor had been involved, simply were unknown.

EPA argued that its right to collect response costs in future cleanups could not be discharged by the debtor's bankruptcy reorganization. Otherwise, EPA argued, it would be forced prematurely to liquidate all its claims for unincurred Superfund response costs, which would require litigation over EPA's choice of remedies and would inevitably require the bankruptcy court to pass on EPA's cleanup decisions. This would constitute impermissible judicial review of EPA's pre-enforcement activity, which is precluded under the Superfund law.¹⁹² The Second Circuit disagreed, however, and held that nothing in the Superfund statute prevented EPA from making "a speedy and rough estimation" of its claims that could be adjusted after the outcome of normal Superfund enforcement proceedings.¹⁹³ At that point, EPA could share pro rata in the debtor's assets.

188. See, e.g., *In re Environmental Waste Control, Inc.*, 125 B.R. 546 (N.D. Ind. 1991) (holding that the debtor was required to expend its full resources on corrective action at a hazardous waste landfill, notwithstanding that: (1) the debtor did not have nearly enough funds to complete the work and (2) expenditure of the funds on a futile corrective action program would leave creditors, including secured creditors, with nothing). Cf. *In re Helder*, 131 B.R. 578 (D.N.J. 1991) (holding that state law environmental claims do not take priority over payment of nonenvironmental secured claims).

189. 944 F.2d 997 (2d Cir. 1991).

190. *Id.* at 1005.

191. *Id.*

192. See 42 U.S.C.A. § 9613(h) (West Supp. 1991).

193. *In re Chateaugay Corp.*, 944 F.2d at 1006.

The case is significant because of its holding that EPA is like any other creditor in bankruptcy and must accept its pro rata share of whatever portion of the debtor's assets are made available for the satisfaction of creditor claims.¹⁹⁴ Consequently, EPA might never be made whole for its Superfund response costs. The court relied in part on a bankruptcy appellate panel's decision in *Jensen v. California Department of Health Services*,¹⁹⁵ which rejected the argument that environmental claims should be treated differently from other claims or should be accorded higher priority.¹⁹⁶

C. Underground Storage Tanks

A new Indiana statute clarifies that any person who has undertaken "corrective action" resulting from the release of petroleum from an underground storage tank, regardless of whether the corrective action is taken voluntarily or pursuant to an IDEM cleanup order, is entitled to contribution from the person who owned or operated the tank at the time the release occurred.¹⁹⁷ The person bringing a successful action is also entitled to reasonable attorney's fees and court costs from the owner or operator.¹⁹⁸ One court already has held that the right to contribution applies even to petroleum releases that occurred before the new law took effect, although only costs and attorney's fees incurred after the effective date are recoverable.¹⁹⁹ Also, the new statute provides that the owner of a petroleum facility (such as an above-ground tank) is entitled to all rights of the state to recover reasonable response or remedial action costs from another responsible person.²⁰⁰

The release of gasoline or other petroleum products from underground storage tanks is a serious environmental problem. Characterizing the scope of contamination and determining the best way to remediate the site can require knowledge of geology, hydrogeology, chemistry, and other technical disciplines. In the past, excavation contractors without any environmental expertise have been engaged to remove leaking tanks

194. The Second Circuit's decision appears to apply only to environmental claims for contamination occurring before the bankruptcy petition was filed. Post-petition releases of hazardous substances presumably could not be discharged by the bankruptcy reorganization.

195. 127 B.R. 27 (E.D. Cal. 1990).

196. *Id.* at 31.

197. IND. CODE § 13-7-20-21 (Supp. 1991).

198. The prior version of the law arguably provided this relief, but the law was confusing and could have been read to permit contribution actions only when corrective action costs were paid over to the state.

199. *The Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 777 F. Supp. 713 (S.D. Ind. 1991).

200. IND. CODE § 13-7-20.1-9(b) (Supp. 1991).

and have actually made the problems worse by misdiagnosing the extent of the contaminant plume, by disrupting confining clay layers in the soil, or by exposing groundwater to surface contaminants. To make sure that only qualified persons perform tank removals, Indiana law now requires persons who supervise, manage, or direct underground tank installations or removals to first apply for a certificate.²⁰¹ Before getting the certificate, an applicant must pay a fee and get a passing score on an examination testing the individual's knowledge of tank installation, testing, retrofitting, removal, and closure.²⁰² Also, applicants must be insured for liability in the amount of one million dollars.²⁰³

D. Administrative Law

Much environmental enforcement activity in Indiana takes place at the administrative agency level, either before IDEM or the Indiana Department of Natural Resources (DNR). Two recent coal cases, one decided by the Indiana Court of Appeals and the other by an Indiana trial court, raise important questions about administrative enforcement procedures. These decisions may have a broad impact on Indiana environmental law.

In the first case, the court of appeals held that an administrative agency enforcing an alleged rule violation bears the burden of proving the violation.²⁰⁴ The burden of proof is never on the person charged with the violation. The concept seems plain. Until the *Peabody Coal* case, no Indiana appellate court had passed on the allocation of the burden of proof in administrative agency enforcement proceedings under the Indiana Administrative Orders and Procedures Act.²⁰⁵ The case sends a warning to all administrative agencies that a mere prima facie showing of a permit violation or some other infraction will not suffice. The agency must prove the violation by the requisite evidentiary standard to justify the imposition of fines or other punitive sanctions.

The *Peabody Coal* case applies to all administrative agency proceedings. It is particularly relevant in environmental cases because the rules of the Indiana Department of Natural Resources expressly provide that in permit revocation proceedings, the permittee, not the agency, bears the burden of persuasion.²⁰⁶ Those rules may now have to be rewritten.

201. *Id.* §§ 13-7-20-13 to -13.4.

202. *Id.* §§ 13-7-20-13.1, -13.2.

203. *Id.* §§ 13-7-20-13 to -13.4.

204. *Peabody Coal Co. v. Ralston*, 578 N.E.2d 751 (Ind. Ct. App. 1991).

205. IND. CODE §§ 4-21.5-3-14, -5-14 (1988) (allocating burdens of persuasion and proof between agency and other party).

206. *Id.* § 4-21.5-5-14.

In another interesting coal mine case, an Indiana trial court held that the entry of summary judgment by an administrative law judge in a DNR enforcement proceeding is not reviewable by the Natural Resources Commission, DNR's "ultimate authority" responsible for entering final DNR orders.²⁰⁷ This is because the Administrative Orders and Procedures Act (AOPA)²⁰⁸ only provides for review by the ultimate authority of orders entered pursuant to Indiana Code section 4-21.5-3-27.²⁰⁹ The AOPA section providing for summary judgments in administrative adjudicative proceedings is a different section.²¹⁰ The court ruled that when an administrative law judge grants a summary judgment, the judge is the ultimate authority and there is no statutory basis for the Natural Resources Commission (or ultimate authorities of other agencies to affirm, modify, or dissolve the order, pursuant to Indiana Code section 4-21.5-3-29).²¹¹

The implications of this are significant. Administrative law judges in Indiana, with exceptions, are not final decisionmakers. The judges make recommendations to the agencies they serve. Those agencies in turn have deliberative policymaking bodies who review the administrative law judge's recommendations and the rest of the agency record and make the "final" decisions, which are then reviewable in court. If summary judgments are final orders after all, then power to determine the outcome of adjudicative proceedings will shift to the administrative law judges and away from the politically appointed bodies that otherwise would constitute the ultimate agency authority.

Also, if summary judgments are final orders and ripe for judicial review, then litigants must prepare to take their appeals to court sooner than might otherwise be expected. Indiana Code section 4-21.5-5-5 provides that petitions for judicial review must be filed within thirty days after service of notice of the final agency action in the controversy.²¹² In Indiana, meeting the filing deadline is a jurisdictional requirement. Most litigants assume that the thirty day time period starts running after the ultimate authority passes on the administrative law judge's recommended order. If it turns out the administrative law judge is the ultimate authority when summary judgment is entered, then the thirty day time period starts running much sooner in the process. If a litigant seeks

207. *United Minerals, Inc. v. Natural Resources Comm'n*, No. 63C01-9009-CP-189 (Pike Cir. Ct. Jan. 1992) (decided by Judge Marvin D. Stratton).

208. IND. CODE §§ 4-21.5-1-1 to -6-6 (1988 & Supp. 1991).

209. That section sets forth the requirements (such as separately stated findings of fact) for all orders, final and nonfinal.

210. IND. CODE § 4-21.5-3-23 (1988).

211. *United Minerals, Inc.*, No. 63C01-9009-CP-189 (Pike Cir. Ct. Jan. 1992).

212. IND. CODE § 4-21.5-5-5 (1988).

further agency review of a summary judgment and waits until after the "ultimate authority" passes on the summary judgment pursuant to Indiana Code section 4-21.5-3-29, then it will be too late to seek judicial review. Any court considering a petition for judicial review in which the administrative law judge granted a summary judgment would have to dismiss the case on the ground that the appeal was not timely perfected.

VI. CONCLUSION

A major focus of environmental law for years to come will be air pollution control. Big businesses have largely implemented emission controls. It is now time for small business to clean up. Many small businesses lack the technical expertise and perhaps financial resources to comply with the new rules. They may depend increasingly on government ombudsmen²¹³ to explain the new requirements, but it will take competent legal counsel to explain *all* the compliance options and help clients navigate the environmental twists and turns.

213. Such as Indiana's Office of Regulatory Ombudsman within the Department of Commerce. For more information, write:

Indiana Department of Commerce
Office of Regulatory Ombudsman
Permit Assistance Center
One North Capitol, Suite 700
Indianapolis, Indiana 46204-2288

or phone:

317-232-7304 or 1-800-824-2476.

Developments in the Law of Evidence

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INTRODUCTION

The purpose of this Article is to alert Indiana practitioners to significant 1991 developments in the law of evidence. The Article first discusses Indiana developments. It then briefly highlights Seventh Circuit and United States Supreme Court decisions of note.

I. INDIANA DEVELOPMENTS

A. Hearsay

Perhaps the most momentous change in Indiana evidence law in 1991 was the Indiana Supreme Court's announcement in *Modesitt v. State*¹ of the abandonment of the exception to the hearsay rule first enunciated in *Patterson v. State*.² In *Patterson*, the Indiana Supreme Court sought to prevent a "misapplication" of the hearsay rule that occurs when out-of-court statements are excluded even though the concerns underlying the hearsay rule about the availability of cross-examination are not implicated.³ The court ruled that out-of-court statements need not be excluded as substantive evidence when the declarant is present and available for cross-examination at trial.⁴ The court noted that a then newly adopted Federal Rule of Evidence⁵ required that the use of such statements be conditioned additionally upon their having been given under oath, but concluded that this safeguard is unnecessary.⁶ In *Modesitt*, the Indiana Supreme Court abandoned the *Patterson* rule and held that

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1. 578 N.E.2d 649 (Ind. 1991).

2. 324 N.E.2d 482 (Ind. 1975).

3. *Id.*

4. *Id.* at 484-85.

5. FED. R. EVID. 801(d)(1)(A).

6. *Id.*

from this point forward,⁷ a prior statement is admissible as substantive evidence only if the declarant testifies at trial and is subject to cross examination concerning the statement, and the statement is (a) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (c) one of identification of a person made after perceiving the person.⁸

In so holding, the Indiana Supreme Court essentially adopted the language embodied in Federal Rule of Evidence 801(d)(1).⁹

The State had charged Modesitt with molesting his girlfriend's daughter at a time when the three of them were living together. The prosecutor's first three witnesses at trial were the victim's mother, a welfare caseworker, and a psychologist. "All three witnesses were permitted to testify, over objection, as to what the victim had told each of them concerning what Modesitt had done to her. . . . Only after this testimony was completed was the victim called to testify."¹⁰ The victim corroborated most but not all of the reported acts of molestation. She was not asked whether she had made the statements testified to by the three prior witnesses or whether the statements were true.

In its discussion, the Indiana Supreme Court first asked whether the *Patterson* rule had been abused.¹¹ The court concluded that it had because the victim's charges were repeated by three witnesses before the victim was called to testify and because the prosecution had failed to lay a foundation for the three witnesses' testimony by asking the victim whether she remembered making the statements.¹² In analyzing whether abuse of the rule had occurred, the court discussed *Patterson* and subsequent cases that refined and qualified its rule.¹³ The court concluded that the rationale

7. The Indiana Supreme Court expressly ruled that this decision should not have any retroactive application to pending or previously decided cases. *Modesitt v. State*, 578 N.E.2d 649, 654 (Ind. 1991).

8. *Id.* at 653-54.

9. The only difference between the two formulations is that the federal rule explicitly states that it applies if the declarant testifies at trial *or hearing*, whereas the supreme court's formulation in *Modesitt* only mentioned a declarant's testimony at trial. It seems unlikely that this serves as a meaningful distinction between the two rules.

10. *Modisett*, 578 N.E.2d at 650.

11. *Id.* at 651.

12. *Id.* at 651-52.

13. *Id.* at 651.

behind those cases was that reliability was safeguarded by the availability of the declarant at trial.¹⁴ The abuse in the instant case, however, occurred because the victim was not available for cross-examination until after her statements had been repeated by the three witnesses.¹⁵ The court stated, "We believe that immediate cross examination is the most effective, and that delayed cross examination is the least effective."¹⁶ Writing in the negative, the court held that it could not find that "the drumbeat repetition" of the victim's story did not unduly prejudice the jury.¹⁷

The court's discussion did not end there. The court went on to announce that the *Patterson* rule should be overruled.¹⁸ Although maintaining the validity of the original rationale motivating the adoption of the rule, that relevant and sufficiently reliable evidence should be presented to the jury, the court nonetheless observed that in the sixteen years since *Patterson* was decided, "numerous decisions by courts throughout this State have confused the application and clouded the original purpose of the rule."¹⁹ The court listed a number of refinements that had been drawn in various cases following *Patterson*²⁰ and concluded that "*Patterson* is no longer recognizable because of the grafting onto it of additional requirements and limitations."²¹ Again defending the rationale behind *Patterson*,²² the court turned to an examination of the practice in other jurisdictions and focused on Federal Rule of Evidence 801(d)(1) as a "well-considered approach that constructs workable guidelines for allowing prior statements to be used during trial."²³ In so ruling, the court apparently abandoned the position expressed in *Patterson* that the oath requirement in Federal Rule 801(d)(1)(A) is unnecessary.²⁴

The question practitioners face at this point is where to look for guidance in interpreting this new aspect of state law on hearsay. Before the adoption of *Patterson*, prior inconsistent statements could be introduced not as substantive evidence, but to impeach²⁵ or to refresh recollection,²⁶ and prior consistent statements could only be used to rehabilitate.²⁷ The

14. *Id.*

15. *Id.* at 651-52.

16. *Id.* at 651.

17. *Id.* at 651-52.

18. *Id.* at 652.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 652-53.

23. *Id.* at 653.

24. *Patterson v. State*, 324 N.E.2d 482, 485 (Ind. 1975).

25. *Id.* at 488 (DeBruler, J., dissenting); *Adams v. State*, 314 N.E.2d 53, 57 (Ind. 1974); *Lee Bros., Inc. v. Jones*, 54 N.E.2d 108, 116 (Ind. Ct. App. 1944) (en banc).

26. *Patterson*, 324 N.E.2d at 488 (DeBruler, J., dissenting).

27. *Carroll v. State*, 338 N.E.2d 264 (Ind. 1975).

use of prior inconsistent statements subject to the conditions specified in *Modesitt* is unprecedented in Indiana law. The nearly verbatim adoption of Federal Rule of Evidence 801(d)(1) suggests that federal precedent will be a useful source of guidance. Indiana courts have referred to federal practice occasionally when resolving Indiana evidentiary issues.²⁸ In any event, practitioners will be forced to resort to these decisions until Indiana courts have the opportunity to construe *Modesitt*. However, in the absence of any pronouncement by the Indiana Supreme Court, federal decisions can be useful, but not binding, upon Indiana courts.²⁹

The hearsay exception for statements against penal interest was adopted in *Thomas v. State*.³⁰ After summarizing past English and federal experience with the use of such statements,³¹ the court noted its approval of Federal Rule of Evidence 804(b)(3), which allows the admission of statements exculpatory of the accused and inculpatory of the declarant when circumstances corroborate the trustworthiness of the statement.³² "This rule [804(b)(3)] serves to assure a defendant his due process right to present evidence in his favor while protecting the trial court's ability to exclude evidence that is irrelevant or insufficiently trustworthy."³³

Following this approach, the court reversed the defendant's conviction because the defendant was not allowed to present the admissions of guilt of another suspect in the same crime.³⁴ The court distinguished *Partlow v. State*³⁵ and *Taggart v. State*,³⁶ in which statements against penal interest were not admitted because of the absence of circumstances corroborating the statements.³⁷

28. See, e.g., *Hensley v. State*, 573 N.E.2d 913, 917-18 (Ind. Ct. App. 1991) (comparing federal practice under Fed. R. Evid. 410 in determining proper use of statements made in plea discussions); *Baker v. Wagers*, 472 N.E.2d 218, 221 (Ind. Ct. App. 1984) (discussing Fed. R. Evid. 803(6) in analyzing business records exception in Indiana).

29. *Hamilton County Dep't of Pub. Welfare v. Smith*, 567 N.E.2d 165, 170 n.2 (Ind. Ct. App. 1991) ("Court decisions interpreting federal statutes with similar language and purpose as the state statute under consideration, while not binding on this court, may aid us in construing the state statute.").

30. 580 N.E.2d 224 (Ind. 1991).

31. *Id.* at 225-26.

32. *Id.* at 226-27.

33. *Id.* at 226.

34. *Id.* at 227.

35. 453 N.E.2d 259 (Ind. 1983), *cert. denied*, 464 U.S. 1072 (1984).

36. 382 N.E.2d 916 (Ind. 1978).

37. *Thomas v. State*, 580 N.E.2d 224, 227 (Ind. 1991). The *Thomas* opinion left open the important question of what degree of corroboration will be required in order for a criminal defendant to be permitted to introduce an exculpatory statement made by an unavailable third party. Constitutional questions may arise if too high a standard is used. See *Green v. Georgia*, 442 U.S. 95 (1979); *Chambers v. Mississippi*, 410 U.S. 284 (1973). Some courts, however, have required a high degree of corroboration and excluded

B. Confrontation Clause

A second major development in Indiana evidence law also occurred in the context of a child molestation case. At issue in *Brady v. State*³⁸ was the admission of the alleged victim's testimony, which was videotaped in her home in the presence of the judge, the prosecuting and defense attorneys, the victim's mother, an investigator, and an equipment operator.³⁹ The tape was subsequently played for the jury at trial.

This procedure was done pursuant to and in compliance with section 35-37-4-8 of the Indiana Code.⁴⁰ During the roughly two hour videotaping, the defendant was stationed in the garage of the home where the child was testifying. The defendant could see and hear the child through closed circuit television, but the child could neither see nor hear him and was unaware of his presence. The defendant could communicate with his attorney, who was in the house, through a microphone hook-up.

The defendant contended that section 35-37-4-8 was unconstitutional on its face because it infringed upon his right, guaranteed by the Sixth Amendment of the United States Constitution⁴¹ and article I, section 13 of the Indiana Constitution,⁴² to confront the witnesses against him.⁴³ After summarizing those two provisions, the Indiana Supreme Court noted

exculpatory statements. See *United States v. MacDonald*, 688 F.2d 224 (4th Cir. 1982), cert. denied, 459 U.S. 1103 (1983).

38. 575 N.E.2d 981 (Ind. 1991).

39. *Id.* at 984.

40. At the time of Brady's trial, this statute provided that the prosecutor could move for a court order either to have a child's testimony taken outside the courtroom and transmitted in by closed circuit television, with questioning by both the prosecutor and the defense attorney transmitted to the child in like fashion, IND. CODE § 35-37-4-8(b) (1988), or to have the testimony videotaped before trial, *id.* § 35-37-4-8(c), the method used in this case. Neither procedure was available unless the conditions specified in Indiana Code § 35-37-4-8(d) were met, including that some sort of evidence be presented as proof that testifying in court would be a traumatic experience for the child. In those instances where the videotape procedure of Indiana Code § 35-37-4-8(c) was used, subsection (f) delineated those persons who were allowed to be in the same room as the child, including, "[t]he defendant, who can observe and hear the testimony of the child without the child being able to observe and hear the defendant. However, if the defendant is not represented by an attorney, the defendant may question the child." *Id.* § 35-37-4-8(f)(7). If the court ordered that either the procedure in subsection (b) or (c) be used, then only the judge, the prosecuting attorney, and the defense attorney or the *pro se* defendant could question the witness. *Id.* § 35-37-4-8(g).

41. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . .").

42. IND. CONST. art. I, § 13 ("In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face. . .").

43. *Id.*

that it had upheld a prior version of this statute⁴⁴ under both provisions in *Miller v. State*,⁴⁵ but that the current statute was significantly different.⁴⁶

The court first addressed the challenge brought under the federal Constitution. Relying on *Delaware v. Fensterer*⁴⁷ and *Maryland v. Craig*,⁴⁸ the court concluded that "the defendant's opportunity for cross-examination has been interpreted as being the essential purpose of the federal confrontation right."⁴⁹ The Indiana Supreme Court noted the United States Supreme Court's conclusion in *Craig* that sometimes the state's interest in protecting the child witness from trauma will justify permitting the child to testify out of court and outside the presence of the defendant.⁵⁰ The court then compared Indiana's statute to the Maryland statute at issue in *Craig*, found them similar in most respects, and concluded that Indiana Code section 35-37-4-8 "as written, when tested by the Sixth Amendment, would be constitutional if construed to also include the Sixth Amendment requirement that such trauma stem from testifying in the presence of the accused, since the statute permits the witness to testify without being able to see or hear the accused."⁵¹ The court said that the Indiana statute, which does not specify how the defendant is to see and hear the witness, will satisfy the federal Constitution if this is done via closed circuit television.⁵² Also passing federal constitutional muster is the Indiana provision whereby the court might prevent the child from seeing and hearing the defendant while the child testifies.⁵³

The one dissimilarity between the Indiana and Maryland statutes noted by the Indiana Supreme Court is that the Maryland statute did not authorize the use of statements videotaped before trial.⁵⁴ The court concluded, however, that the difference in the two methods of presenting the child's testimony does not affect the balance struck in *Craig* between the state's interest in protecting the child witness and the Confrontation Clause.⁵⁵

44. IND. CODE § 35-37-4-6 (1988).

45. 517 N.E.2d 64 (Ind. 1987). The *Miller* court held the taped statements in that case inadmissible, however, for a failure to provide an opportunity for cross-examination.

46. For example, the statute analyzed in *Miller* did not contain the equivalent of the closed circuit television procedure in Indiana Code § 35-37-4-8(b) (1988), and the *Miller* statute required "corroborative evidence of the act that was allegedly committed against the child" before a videotape could be admitted into evidence. IND. CODE § 35-37-4-6(d) (1988).

47. 474 U.S. 15 (1985) (per curiam).

48. 110 S.Ct. 3157 (1990).

49. *Brady v. State*, 575 N.E.2d 981, 985 (Ind. 1991).

50. *Id.* at 986.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

The outcome of the analysis under the Indiana Constitution was different. The court stated that “[a] face-to-face meeting occurs when persons are positioned in the presence of one another so as to permit each to see and recognize the other.”⁵⁶ Although the court recognized that the Confrontation Clause of the federal Constitution and article I, section 13 of the Indiana Constitution have much in common, the court found that Indiana’s provision “has a special concreteness and is more detailed.”⁵⁷

Focusing on article I, section 13 alone, the court proceeded to catalogue a number of limits on the right to a face-to-face meeting: it can be waived, it does not apply when a deposition is taken, and it does not exist with respect to witnesses other than those called by the prosecution.⁵⁸ Furthermore, in cases of necessity, the right will not preclude the subsequent use of testimony when there is a prior face-to-face meeting at a hearing or trial with an opportunity to cross-examine the witness before the trier of fact in the same case.⁵⁹

The court then discussed prior cases which “exemplify [the] Court’s tradition of recognizing that Indiana’s confrontation right contains both the right to cross-examination and the right to meet the witnesses face-to-face.”⁶⁰ The two rights are not co-extensive.

The Indiana Constitution recognizes that there is something unique and important in requiring the face-to-face meeting between the accused and the State’s witnesses as they give their trial testimony. While the right to cross-examination may be the primary interest protected by the confrontation right in Article I, § 13 of the Indiana Constitution, the defendant’s right to meet the witnesses face to face cannot simply be read out of our State’s Constitution.⁶¹

The Indiana Supreme Court then cited federal cases to demonstrate that face-to-face confrontation is an important part of the Sixth Amendment as well. Indeed, although the United States Supreme Court upheld the closed circuit television procedure used in *Craig* in light of the state’s interest in protecting the child witness,⁶² four members of the court dissented. Writing for the dissenters, Justice Scalia argued, “Whatever else it may mean in addition, the defendant’s constitutional right ‘to be confronted with the witnesses against him’ means, always and everywhere,

56. *Id.* at 987.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 988.

61. *Id.*

62. *Maryland v. Craig*, 110 S. Ct. 3157, 3170 (1990).

at least what it explicitly says: the 'right to meet face to face all those who appear and give evidence at trial.'"⁶³

Federal case law aside, the Indiana Supreme Court concluded that subsections (c) and (f)(7) of section 35-37-4-8 violated article I, section 13 of the Indiana Constitution.⁶⁴ However, the court found that the remainder of the statute was left in administrable form.⁶⁵ In particular, when testifying in court in the presence of the accused will be a "potentially traumatic experience" for a witness⁶⁶ (although how much so the court did not specify), a procedure for receiving a child's testimony and transmitting questions via closed circuit television when the witness can see the accused and the accused can see and hear the witness will not offend the right to meet the witness face to face.⁶⁷

Shortly after *Brady* was decided, the Indiana Supreme Court faced the question in *Hart v. State*⁶⁸ of whether a conviction must be reversed because of the admission at trial of the pre-recorded videotaped testimony of an alleged child victim. The court concluded that the failure to provide the defendant with a face-to-face meeting with the witness was not fundamental error when the videotaped testimony of the child is "remarkably consistent with traditional judicial fact-finding procedures."⁶⁹ The witness, the court noted, was previously videotaped in the courtroom, and although the defendant was not there, the jury was able to view the witness's movements on tape in order to assess credibility.⁷⁰ Accordingly, because the error was not fundamental and because the defendant did not specifically object at trial, the conviction was affirmed.⁷¹

C. Cross-Examination and Impeachment

During 1991, Indiana courts dealt with a number of interesting issues pertaining to the examination of witnesses on the stand and permissible uses of testimony given outside the courtroom.

In *Pelican, Inc. v. Downey*,⁷² the First District Court of Appeals explored when impeachment should be allowed and the circumstances

63. *Id.* at 3172 (Scalia, J., dissenting) (quoting *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988)).

64. *Brady v. State*, 575 N.E.2d 981, 988 (Ind. 1991). These two subsections of the statute provided for the pre-trial videotaping of testimony and that the child witness would not be able to see or hear the defendant.

65. *Id.* at 988-89.

66. *Id.* at 989.

67. *Id.*

68. 578 N.E.2d 336 (Ind. 1991).

69. *Id.* at 337.

70. *Id.*

71. *Id.*

72. 567 N.E.2d 847 (Ind. Ct. App. 1991).

under which a witness is considered hostile so that the proponent may ask leading questions. Downey sued The Pelican restaurant after a Coke glass shattered and severely lacerated his left hand while he was at the restaurant. On appeal, the appellant argued that the trial court abused its discretion in refusing to allow it to ask leading questions on direct examination in order to impeach a witness with prior inconsistent statements. The witness was Kelly Whitehead, a woman seated at Downey's table at the time of the incident, and the prior statements she allegedly made to her supervisor were that she had observed the incident (contrary to her direct testimony), that Downey was intoxicated and had slammed the glass on the table in anger, and that she intended to lie about the events and to testify that the glass was overturned when a waitress knocked the table.⁷³

With respect to the issue of whether leading questions should have been allowed, the court of appeals noted that Whitehead's testimony on direct that she had not witnessed the accident did not exculpate Downey.⁷⁴ A witness is considered hostile when her testimony exculpates the opponent and the witness has admitted, explained, or denied the prior statement.⁷⁵ Whitehead's testimony was that she had not seen the accident; this did not exculpate Downey.⁷⁶ Moreover, the fact established on the record that Whitehead was a close friend of Downey was also insufficient to show that she was a hostile witness when called by the appellant.⁷⁷ Accordingly, the court of appeals found that the trial court had not abused its discretion in refusing to allow leading questions.⁷⁸

As to whether impeachment should have been allowed, the court of appeals stated that "[a] witness may be impeached when he shows his hostility during examination and his friendliness to the opponent, and is informed of the time and place of his contradictory statement so he may admit or deny it."⁷⁹ The court emphasized that "it is not necessary that one's witness be declared hostile before commencing an impeachment."⁸⁰ In this case, the court of appeals noted that because Whitehead denied making the statements, they could not be admitted as substantive evidence.⁸¹ Because the statements could only be used for impeachment purposes, and because they were cumulative of the testimony of another witness,

73. *Id.* at 849.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 850.

78. *Id.*

79. *Id.* at 849 (citation omitted).

80. *Id.* (citation omitted).

81. *Id.* at 850.

the court of appeals ruled that the appellant was not prejudiced by their exclusion.⁸² The court also quoted a Nebraska decision that stated:

[T]he rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be revealed to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury a favorable extrajudicial statement previously made by the prior witness.⁸³

Affirming the trial court, the court of appeals concluded that it "refuse[d] to reverse the trial court to permit improper use of the impeachment rule."⁸⁴

Although Indiana courts have previously dealt with the issue of a witness's competency to testify when the witness is under the influence of drugs or intoxicating liquor at the time of the incident about which the witness was to testify,⁸⁵ in *Boyko v. State*,⁸⁶ the Third District Court of Appeals dealt with the relatively novel issue of a witness's competency when he is under the influence of narcotics at the time of his testimony.⁸⁷ Boyko was on trial for murder. While incarcerated the night before he was to testify, Boyko took an antidepressant.

The court of appeals observed that other jurisdictions generally do not apply a per se incompetency rule for witnesses who have used drugs.⁸⁸ "These authorities have generally required a demonstration of impairment of one of the essential elements of competency before reversal is warranted."⁸⁹ Following this approach, the Third District Court of Appeals noted that "[a] witness is competent if he has sufficient mental capacity to perceive, to remember and to narrate the incident he has observed and to understand and appreciate the nature and obligation of an oath."⁹⁰ The trial court would be reversed only upon a showing of a "manifest abuse" of discretion.⁹¹

82. *Id.*

83. *Id.* (quoting *State v. Keithley*, 418 N.W.2d 212, 215 (Neb. 1988)).

84. *Id.*

85. See, e.g., *Jones v. State*, 445 N.E.2d 92 (Ind. 1983) (marijuana use); *State v. Kubiak*, 4 N.E.2d 193 (Ind. 1936) (alcohol consumption). These decisions have treated such situations as raising credibility rather than competency issues. *Boyko v. State*, 566 N.E.2d 1060, 1062 n.1 (Ind. Ct. App. 1991).

86. 566 N.E.2d 1060 (Ind. Ct. App. 1991).

87. Dicta in *Kubiak*, did suggest that intoxication at the time of testimony might raise competency issues. *Kubiak*, 4 N.E.2d at 193-94.

88. *Boyko*, 566 N.E.2d at 1062-63.

89. *Id.* at 1063.

90. *Id.* at 1062 (citation omitted).

91. *Id.*

In a one paragraph analysis, the court of appeals concluded that Boyko had not made the requisite showing with respect to the elements of competency.⁹² The court of appeals noted that the trial court had held a hearing to determine the extent of Boyko's incompetence.⁹³ Testimony from this hearing indicated that the drug taken by the defendant would remain in his system anywhere from eight to twenty-four hours after consumption.⁹⁴ The trial judge then continued the trial until sixteen hours had passed from when Boyko took the drug.⁹⁵ The defendant wished to take the stand despite his recognition that he was a bit groggy. Although the court of appeals did not touch upon each of the elements of competency, it noted that Boyko "testif[ied] in a lucid, coherent manner."⁹⁶ Applying a deferential level of review, the court of appeals found no abuse of discretion on the part of the trial court.⁹⁷

In *Kelley v. State*,⁹⁸ the court of appeals dealt with the question of whether the trial court erred in prohibiting the defendant in a child molestation case from presenting testimony of the victim's prior false reports of sexual molestation.⁹⁹ The court noted that Indiana's rape shield law¹⁰⁰ does not bar this type of evidence because it "goes to the victim's credibility, not her history of sexual conduct."¹⁰¹

Kelley wanted to question the mother of the victim about a prior occasion when the victim had accused a schoolteacher of molesting her.¹⁰² "Evidence of false allegations of similar sexual misconduct is admissible on the subject of the victim's credibility so long as the allegations are demonstrably false."¹⁰³ Upon questioning by the trial judge, defense counsel acknowledged that he did not have evidence that the victim admitted the falsity of the prior allegations or that the accused teacher had been tried and acquitted.¹⁰⁴ Without elaborating on what other circumstances, if any, would satisfy the "demonstrably false" requirement, the court of appeals found that the evidence was properly excluded.¹⁰⁵

92. *Id.* at 1063.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. 566 N.E.2d 591 (Ind. Ct. App. 1991).

99. *Id.* at 592.

100. IND. CODE § 35-37-4-4 (1988).

101. *Kelley*, 566 N.E.2d at 593.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

D. Privileges

1991 also brought forth developments in the law of privileges. The principal ones were as follows.

1. *Psychologist-Patient; Social Workers.*—In *Jorgensen v. State*,¹⁰⁶ the Indiana Supreme Court reviewed an important exception to the psychologist-patient privilege. In this appeal of a conviction for murder and conspiracy to commit murder, Jorgensen claimed that Cochran, not she, had murdered her husband. The evidence adduced at trial included testimony that Cochran had told a friend that he wanted to kill the victim.¹⁰⁷ The trial court was also aware of Cochran's written confessions to the murder, although Jorgensen ultimately chose not to offer them into evidence because the trial court denied her motion to redact certain portions of them.¹⁰⁸

The alleged error discussed by the supreme court was the trial court's denial of the defendant's request to take the depositions of a social worker and a psychologist she claimed had counseled Cochran and to whom she thought Cochran might have made incriminating statements. The supreme court first declared itself unaware of any privilege applicable to the social worker.¹⁰⁹ Then, with respect to the psychologist, to whom a privilege does apply, it pointed out that any information possessed by him that "relate[d] directly to the fact or immediate circumstances of [the] homicide" would meet a statutory exception to the psychologist-patient privilege and was therefore discoverable.¹¹⁰ Finally, the supreme court held that the trial court should have allowed the defendant to conduct some discovery of the two counselors for the purpose of ascertaining whether they possessed any information material to the defense.¹¹¹ The supreme court explained

106. 574 N.E.2d 915 (Ind. 1991) [hereinafter *Jorgensen II*].

107. *Id.* at 916.

108. *Jorgensen v. State*, 567 N.E.2d 113, 124 (Ind. Ct. App. 1991) [hereinafter *Joregensen I*], *aff'd*, 574 N.E.2d 915 (Ind. 1991).

109. *Jorgensen II*, 574 N.E.2d at 917.

110. The privilege and the exception referred to are found at IND. CODE § 25-33-1-17 (1988), which provides:

A psychologist certified under this article may not disclose any information acquired from persons with whom the psychologist has dealt in a professional capacity, except under the following circumstances:

(1) Trials for homicide when the disclosure relates directly to the fact or immediate circumstance of said homicide. . . .

111. In so holding, the court was applying the familiar test for ruling on a criminal defendant's discovery requests: if (1) the defendant makes a "sufficient designation of the items sought to be discovered" and (2) the items are "material to the defense," then the court must grant the discovery request unless (3) "the State makes a showing of paramount interest in non-disclosure." *Kindred v. State*, 540 N.E.2d 1161, 1174 (Ind. 1989). The first element was clearly satisfied because the defendant had specified "the identity of those persons she wished to depose." *Jorgensen II*, 574 N.E.2d at 917.

that to deny Jorgensen's request on the ground that she had not shown the evidence she sought would be material, without first allowing her some opportunity to conduct discovery, placed her in an impossible "catch-22" situation.¹¹²

2. *Physician-Patient*.—In *Terre Haute Regional Hospital, Inc. v. Trueblood*,¹¹³ the First District Court of Appeals held that a plaintiff claiming unnecessary surgeries is not permitted to discover the medical records of other patients of the same doctor who underwent similar surgeries during the relevant time period.¹¹⁴ Trueblood brought suit against the hospital for negligent hiring and supervision of the staff physician who operated on her. She sought the other patients' records in order to show actual or constructive knowledge by the hospital of the doctor's misconduct. The court held that there could be no compelled discovery of the medical records of nonparty patients who had not waived their privilege, regardless of the measures taken through redaction to prevent disclosure of the nonparty patients' identities.¹¹⁵

3. *Self-Incrimination*.—In *Lock v. State*,¹¹⁶ the Indiana Supreme Court addressed the Fifth Amendment privilege against self-incrimination.¹¹⁷ Lock testified voluntarily at her first trial, which ended in a mistrial, but chose not to testify at her second trial and was convicted. On appeal, she claimed that the trial court violated her Fifth Amendment privilege when it allowed the prosecutor to introduce as evidence at the second trial her testimony from the first trial, portions of which she later came to regret.

The supreme court agreed that in testifying at her first trial the defendant had not waived her Fifth Amendment privilege for purposes of her second trial and therefore could not be forced to testify at her second trial.¹¹⁸ The court found nonetheless that the admission of her first-trial testimony did not violate her Fifth Amendment privilege.¹¹⁹ It recited the hearsay exception that makes prior recorded testimony admissible and then stated that her first-trial testimony was admissible "in

112. *Jorgensen II*, 574 N.E.2d at 917. It is possible, however, that the court would not so readily have allowed a fishing expedition had Cochran not, on other occasions, spoken and written of his involvement in the murder because this evidence provided some basis for believing that his social worker or psychologist might also have received such information from him.

113. 579 N.E.2d 1342 (Ind. Ct. App. 1991).

114. *Id.* at 1346.

115. *Id.* In so holding, the court was interpreting Indiana Code §§ 34-1-14-5(3) (physician-patient privilege) and 16-4-8-3 (limitation of access to medical records).

116. 567 N.E.2d 1155 (Ind. 1991).

117. U.S. CONST. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself . . .").

118. *Lock*, 567 N.E.2d at 1160.

119. *Id.* at 1160-61.

the same manner as a statement or admission against interest given prior to a trial is admissible at a later trial even if the defendant chooses not to testify at such trial."¹²⁰

4. *Attorney-Client*.—There were two decisions of note in 1991 concerning the attorney-client privilege. In *Korff v. State*,¹²¹ for the first time, the Indiana Supreme Court held that an attorney's communication to his client of the date, time, and place of a hearing is not "confidential" and therefore, is not privileged.¹²² Thus, when the defendant was charged with failure to appear at his trial for battery with a deadly weapon, the trial court did not err in denying the defendant's motion to suppress the testimony of his former attorney that the attorney had informed the defendant of the date, time, and place of his trial.¹²³

Second, in *Liberty Mutual Insurance Co. v. Blakesley*,¹²⁴ the Third District Court of Appeals held that when a client admits that he received advice from his attorney concerning a transaction, he does not waive his attorney-client privilege with respect to the content of the discussion.¹²⁵ Therefore, the trial court did not err in preventing the client's former attorney from testifying about the advice he gave to his client, even though the client had admitted on cross-examination that he had obtained advice from his then attorney.¹²⁶

E. Presumptions

*Collins v. State*¹²⁷ involved an appeal from a conviction under section 9-12-3-1 of the Indiana Code for operating a motor vehicle after suspension of a driver's license for being a habitual traffic violator.¹²⁸ The Indiana Supreme Court ruled that the trial court committed fundamental error in using the following final instruction:

Evidence that a letter properly addressed, stamped and deposited in the U.S. Mail is prima facie proof that the letter was received by the person to whom it was addressed. Whether the denial of

120. *Id.* at 1160. The court did not indicate whether it ultimately relied on the hearsay exception for prior testimony of a witness or the exception for admissions of a party-opponent, or both. A principal difference between the two is that under the admissions exception the unavailability of the declarant is irrelevant. See 13 ROBERT L. MILLER, INDIANA PRACTICE § 801.423, at 132 (1984) [hereinafter INDIANA PRACTICE].

121. 567 N.E.2d 1146 (Ind. 1991).

122. *Id.* at 1148.

123. *Id.* at 1147.

124. 568 N.E.2d 1052 (Ind. Ct. App. 1991).

125. *Id.* at 1059.

126. *Id.* at 1058-59.

127. 567 N.E.2d 798 (Ind. 1991).

128. *Id.* at 799.

receipt by the person to whom the letter was addressed is sufficient to overcome the prima facie case is for the trier of fact to determine from all of the evidence.

"Prima facie evidence" means such evidence as is sufficient to establish a given fact and which will remain sufficient if uncontradicted.¹²⁹

Because this instruction could reasonably be construed as stating that proof of mailing constituted proof of receipt, thereby shifting the burden of proof to the defendant, the supreme court found that it created an impermissible mandatory presumption.¹³⁰

F. Expert and Opinion Testimony

Four 1991 decisions on the subject of expert and opinion testimony are worthy of note. Two concern the lay opinion rule and two address expert testimony.

1. *The Lay Opinion Rule*.—The lay opinion rule "generally demands that a nonexpert witness testify only to facts known to the witness; the witness' opinions or conclusions are generally inadmissible."¹³¹ In *Humphries v. State*,¹³² the Fourth District Court of Appeals applied this rule in curious ways.

Humphries involved the appeal of a conviction for disorderly conduct under the Indiana statute that provides: "A person who recklessly, knowingly, or intentionally: . . . (2) makes unreasonable noise and continues to do so after being asked to stop . . . commits disorderly conduct"¹³³ At trial, the State's only witness was the arresting officer, who testified that when he stopped the defendant, Humphries "became belligerent," "began to curse at [him] and the other officers," and was requested twice to "quiet down" or else face arrest for disorderly conduct.¹³⁴ Instead of complying, the defendant became "more agitated" and "continually asked why he had been stopped."¹³⁵ The officer then began to "consider himself to be in physical danger."¹³⁶ The court of appeals concluded that the

129. *Id.* at 801. In order to establish the offense of driving after having been adjudged a habitual traffic violator, the State must prove the defendant's knowledge of his or her suspension as a result of this status. *Id.* at 800; *State v. Keihn*, 542 N.E.2d 963, 968 (Ind. 1989).

130. *Collins*, 567 N.E.2d at 801. The conviction was affirmed, however, because the defendant's objection was not timely, and the court found the error to be harmless in light of other evidence admitted. *Id.*

131. 13 INDIANA PRACTICE, *supra* note 120, § 701.101, at 3.

132. 568 N.E.2d 1033 (Ind. Ct. App. 1991).

133. IND. CODE § 35-45-1-3 (1988).

134. *Humphries*, 568 N.E.2d at 1035.

135. *Id.*

136. *Id.* at 1036.

officer's statements about the defendant's "manner of speech, demeanor and conduct" were improper lay opinions, but noted that the defendant had not raised this objection at trial.¹³⁷ The court then declared that although admitted without objection, these statements alone could not sustain the conviction because they did not constitute "substantial evidence having probative value" of guilt.¹³⁸ The court reasoned that since lay opinions are inadmissible *because* they have no probative value, the statements supplied no evidence of guilt.¹³⁹

Ultimately, however, the court affirmed the conviction, finding other evidence of guilt in the record. It held that the officer's testimony that he had twice asked the defendant to "quiet down" or face arrest created inferences of two of the elements of disorderly conduct as defined in the statute: first, it suggested that the defendant had been speaking unreasonably loudly; second, it suggested that he had been asked to stop doing so.¹⁴⁰ Moreover, the court said, the fact that the officer later arrested the defendant created an inference that the defendant had continued to speak unreasonably loudly.¹⁴¹

The court's analysis is problematic in several respects. First, the court remarked that lay opinions are inadmissible because they lack all probative value. The usual view in Indiana and elsewhere is that lay opinions are excluded for reasons of judicial economy.¹⁴² If the court had recognized the actual rationale underlying the lay opinion rule, it would merely have found that the defendant, having failed to require the State to introduce facts from which the jury could draw its own conclusions about the defendant's demeanor, had waived his right to object to the State's establishing those conclusions directly by the introduction of otherwise inadmissible lay opinion testimony. In other words, instead of finding that the officer's conclusory statements about the defendant's "manner of speech, demeanor and conduct" were altogether unprobative, the court would have found that they proved the very conclusions which they embodied.

Even under this approach, however, a court should have found that the evidence of the defendant's "manner of speech, demeanor and conduct" did not sustain his conviction. Whereas the *Humphries* court reached this conclusion by labeling this evidence not probative, it failed to see an even more basic problem with it. The officer's statements that the

137. *Id.*

138. *Id.* at 1037.

139. *Id.* at 1036.

140. *Id.* at 1037.

141. *Id.*

142. 13 INDIANA PRACTICE, *supra* note 120, § 701.101; JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1918 (James H. Chadbourn rev. ed. 1978).

defendant "cursed at" him, was "belligerent," and was "agitated" say nothing about whether the defendant engaged in the conduct prohibited by the statute, that is, whether he made unreasonable noise. A better analysis, therefore, would have been to find these statements immaterial.

An additional problem with sustaining the conviction on the basis of statements about the defendant's cursing and belligerence is that these connote content, rather than volume. A conviction on the basis of these statements alone would raise serious First Amendment concerns that could perhaps be overcome, but would have to be addressed.¹⁴³ The *Humphries* court recognized that a person stopped by the police has a right under the federal and Indiana Constitutions "to question and argue with the police."¹⁴⁴ The court refused, however, to admit that this right may have been abridged in this case.¹⁴⁵

The *Humphries* court's final error was to treat the officer's statement that he had to ask the defendant to quiet down as evidence that the defendant was speaking unreasonably loudly. The court should have inferred from this statement only that *in the officer's opinion* the defendant was speaking unreasonably loudly. It is ironic that having misapplied the lay opinion rule to find certain of the officer's statements insufficient to support the conviction, while ignoring the fact that those opinions were in any case not relevant to guilt, the court then affirmed the conviction by finding a different statement relevant to guilt, while failing to recognize it as an impermissible lay opinion.

In contrast, the supreme court in *Tunstill v. State*¹⁴⁶ displayed a clear grasp of the lay opinion rule, vacating Tunstill's sentence for voluntary manslaughter.¹⁴⁷ The supreme court disapproved of the sentencing court's consideration of Tunstill's prior arrests as an aggravating circumstance under the statutory provision allowing sentence enhancement for "a history of criminal or delinquent activity."¹⁴⁸ The supreme court concluded that

143. See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 521-22 (1972) ("The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly limited classes of speech.'").

144. *Humphries v. State*, 568 N.E.2d 1033, 1036 (Ind. Ct. App. 1991) (citing *Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973)).

145. *Id.* These First Amendment issues were addressed directly in *Brown v. State*, 576 N.E.2d 605 (Ind. Ct. App. 1991), which found no constitutional violation and held that there was sufficient evidence to support a conviction for disorderly conduct, when the evidence showed the defendant became loud and abusive after his arrest for receiving stolen property and when the words used clearly fell within the "fighting words" category of unprotected speech. *Id.* at 605-07.

146. 568 N.E.2d 539 (Ind. 1991).

147. *Id.* at 547.

148. IND. CODE § 35-38-1-7(b)(2) (1988) (since repealed but replaced with identical language now found at IND. CODE § 35-38-1-7.1(b)(2) (Supp. 1991)).

"[t]he act of placing a person under arrest indicates only a belief, albeit strong, that the arrested person is guilty of a crime, but does not itself constitute a determination of the historical fact of that person's guilt."¹⁴⁹

2. *Expert Testimony*.—A case decided by the Fifth District Court of Appeals addressed the problem of allowing a judge to testify as an expert in a malpractice action arising from a case over which he had presided as judge. In *Cornett v. Johnson*,¹⁵⁰ a client sued his attorney for negligently failing to present certain evidence in a divorce proceeding. The trial court in the malpractice case allowed the judge in the divorce proceeding to testify for the client that the attorney's omission was the proximate cause of the harm alleged in the divorce court's division of the marital property.

On appeal, the Fifth District held that the appropriate standard for proximate cause under these circumstances is what the "reasonable judge" (rather than the actual presiding judge) would have done if the attorney had presented the evidence.¹⁵¹ The court reasoned that an objective standard is dictated both by general principles of proximate cause and by policy concerns in the particular situation of a judge testifying as an expert.¹⁵² These concerns are the danger of prejudice to one party from the possibility that the judge may appear to side with the other party or may create an appearance of impropriety in violation of the Code of Judicial Conduct,¹⁵³ and the court's fear of opening the door to the reconvening of a jury to be questioned as to how it would have resolved a case if the evidence had been different.¹⁵⁴ The court did not address the manner in which a party would prove what a reasonable judge would have done. Perhaps this would require calling a judge as an expert witness.

*Southlake Limousine & Coach, Inc. v. Brock*¹⁵⁵ addressed a novel issue concerning expert testimony and hedonic damages. In this wrongful death action, the court of appeals held that an expert economist's testimony as to the value of the decedent's life is inadmissible as an aid to the jury in determining the loss of affection, love, parental training, and guidance to the surviving spouse and children.¹⁵⁶ The court found that

149. *Tunstill*, 568 N.E.2d at 544. The supreme court then noted, however, that prior arrests *are* relevant at sentencing under the catch-all provision, IND. CODE § 35-38-1-7(d) (1988) (since repealed but replaced with identical language now found at IND. CODE § 35-38-1-7.1(d) (Supp. 1991)). The court reasoned that committing a crime despite prior brushes with the law indicates an undeterrable character. *Tunstill*, 568 N.E.2d at 545.

150. 571 N.E.2d 572 (Ind. Ct. App. 1991).

151. *Id.* at 575.

152. *Id.*

153. See INDIANA CODE OF JUDICIAL CONDUCT CANON 2(B).

154. *Cornett*, 571 N.E.2d at 575.

155. 578 N.E.2d 677 (Ind. Ct. App. 1991).

156. *Id.* at 682.

the jury needed no expert assistance in valuing these losses; thus, the testimony invaded the province of the jury.¹⁵⁷

Finally, two 1991 cases on the subject of expert psychiatric and psychological testimony are significant. In *Lowrance v. State*,¹⁵⁸ the court of appeals made clear that Indiana still allows expert testimony on a criminal defendant's sanity, despite the prohibition against legal opinions.¹⁵⁹ Then, in *Byrd v. State*,¹⁶⁰ the court of appeals held that a psychiatrist could testify that in his opinion the results of a Minnesota Multi-Phasic Personality Inventory (MMPI) test showed that the defendant's personality profile was inconsistent with the knowledge element of his murder charge.¹⁶¹

A subtle distinction between the sanity and the *mens rea* rules as revealed by these two cases is that in *Lowrance* the court said an expert may give his opinion of the defendant's sanity directly, whereas in *Byrd* the court stressed that the expert could not properly testify that in his opinion the defendant had not satisfied the knowledge element. Instead, the expert in *Byrd* could only testify that in his opinion the MMPI results already in evidence were inconsistent with the knowledge element.

G. Novel Scientific Evidence

In 1991, the Supreme Court of Indiana, in a case of first impression, addressed the question of the admissibility of DNA evidence to identify the perpetrator of a crime. *Hopkins v. State*¹⁶² quoted the three-prong version of the *Frye* test¹⁶³ given in a New York state court opinion on the admissibility of DNA evidence.¹⁶⁴ *Hopkins* held that DNA evidence

157. *Id.*

158. 565 N.E.2d 375 (Ind. Ct. App. 1991)

159. *Id.* at 378. See generally 13 INDIANA PRACTICE, *supra* note 120, § 704.102 (Supp. 1991) (contrasting Indiana and federal law).

160. 579 N.E.2d 457 (Ind. Ct. App. 1991).

161. *Id.* at 461. The *Byrd* court also held that a psychiatrist could testify that the defendant might legitimately be suffering from retrograde amnesia, when the State had repeatedly challenged the defendant's claim that he could not remember. *Id.* at 461-62.

162. 579 N.E.2d 1297 (Ind. 1991).

163. So named after *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

164. *People v. Castro*, 545 N.Y.S.2d 985 (N.Y. Sup. Ct. 1989). In *Castro*, the New York court described the *Frye* test in the context of DNA evidence as follows:

Prong I. Is there a theory, which is generally accepted in the scientific community, which supports the conclusion that DNA forensic testing can produce reliable results?

Prong II. Are there techniques or experiments that currently exist that are capable of producing reliable results in DNA identification and which are generally accepted in the scientific community?

Prong III. Did the testing laboratory perform the accepted scientific techniques in analyzing the forensic samples in this particular case?"

Id. at 987, quoted in *Hopkins*, 579 N.E.2d at 1302.

is admissible as a matter of law because it satisfies the first two prongs of the analysis, that is, because "the theory and techniques of DNA identification currently available are generally accepted in the scientific community as capable of producing reliable results."¹⁶⁵ The supreme court based its conclusions on case law and on the record in the case before it, but noted that these conclusions were in accord with an Indiana statute concerning DNA evidence that was passed after Hopkins's trial took place.¹⁶⁶

Hopkins further held:

[O]nce the trial court has ruled the witness qualified as a matter of law to give expert testimony regarding DNA analysis, subsequent evaluation of that evidence goes only to its weight as a matter of fact. Any battle of qualified experts . . . or other conflict as to the reliability of evidence is to be resolved by the trier of fact.¹⁶⁷

Thus, the defendant's argument that the testing laboratory had not performed the accepted techniques in this particular case did not affect the admissibility of the DNA evidence and was an issue to be resolved by the trier of fact.¹⁶⁸ In so holding, *Hopkins* differed from the New York opinion to which it owed the three-prong analysis it applied. The New York case concluded that the third prong of the analysis must be raised at a pre-trial hearing before the court.¹⁶⁹

In an interesting concurring opinion, Justice Dickson questioned whether court determination of the *Frye* general acceptance standard (prongs one and two of the test) should be a prerequisite to the admissibility of expert testimony.¹⁷⁰ Justice Dickson noted that many courts and commentators have suggested that after a determination by the court that the expert is qualified and his evidence relevant, all questions concerning the reliability

165. *Hopkins*, 579 N.E.2d at 1302.

166. IND. CODE § 35-37-4-13(b) (Supp. 1991) (originally enacted in 1990 as IND. CODE § 35-37-4-10(b)) ("In a criminal trial or hearing, the results of forensic DNA analysis are admissible in evidence without antecedent expert testimony that forensic DNA analysis provides a trustworthy and reliable method of identifying characteristics in an individual's genetic material.").

167. *Hopkins v. State*, 579 N.E.2d 1297, 1303 (Ind. 1991). *Accord Davidson v. State*, 580 N.E.2d 238, 243 (Ind. 1991) (citing *Hopkins*, the court found it unnecessary to hold an admissibility hearing out of the jury's presence on the issue of whether the testing laboratory performed the accepted techniques in the particular case because there was no objection to the qualifications of the experts; any irregularities in the procedures went only to the weight, not the admissibility, of the evidence).

168. *Hopkins*, 579 N.E.2d at 1303.

169. *People v. Castro*, 545 N.Y.S.2d 985, 988 (N.Y. Sup. Ct. 1989).

170. *Hopkins*, 579 N.E.2d at 1305 (Dickson, J., concurring).

of the evidence should be left to the trier of fact. He further urged that the majority's opinion not be taken to compel the use of the *Frye* methodology for the admission of all novel scientific evidence.¹⁷¹

H. Extrinsic Offenses

The general rule of extrinsic offenses¹⁷² states that evidence of a defendant's prior misconduct is inadmissible to show that the defendant is the kind of person who commits crimes and therefore is guilty of the crime charged.¹⁷³ In *Street v. State*,¹⁷⁴ the Fifth District Court of Appeals provided a useful summary of the law of extrinsic offenses and a detailed analysis of several exceptions to the general rule.

Street was appealing his conviction for receiving stolen property and dealing in marijuana to a minor. Street had allegedly given marijuana to Wright (the minor) in exchange for goods Wright had stolen. The trial court allowed Wright to testify that a week and a half before the charged events the defendant had given him marijuana in exchange for some personal property belonging to Wright. The court of appeals reversed the conviction, holding that permitting the testimony was reversible error.¹⁷⁵

In determining that the minor's testimony with respect to the dealing charge was inadmissible,¹⁷⁶ the *Street* court recognized that the traditional exceptions allowing extrinsic offense evidence to prove a defendant's intent, motive, purpose, or identity only properly apply when these matters are at issue in the case.¹⁷⁷ That the court accepted this principle is clear from its holding that the minor's testimony was not admissible under either the state of mind or the identity exception because the only issue with respect to the dealing charge was whether the defendant had engaged in

171. See *id.* at 1307.

172. The Indiana Supreme Court has expressed a preference for this phrase "to describe a defendant's other crimes, wrongs or acts that remain uncharged in the case under consideration." *Gibbs v. State*, 538 N.E.2d 937, 939 n.1 (Ind. 1989).

173. See, e.g., *Street v. State*, 567 N.E.2d 1180, 1183-84 (Ind. Ct. App. 1991).

174. 567 N.E.2d 1180 (Ind. Ct. App. 1991).

175. *Id.* at 1187-88.

176. The court noted that Wright's testimony was inadmissible to prove the charge of receiving stolen property because it had no relevance to that charge. The court reasoned that the only issue with respect to the receiving charge was whether the defendant *knew* the goods he accepted from the minor were stolen; testimony about a prior exchange of marijuana for goods actually owned by the minor, not stolen, was irrelevant to that issue. *Id.* at 1185.

177. Without this *caveat*, the exceptions would swallow the rule. See *id.* But see 12 INDIANA PRACTICE, *supra* note 120, § 404.208, at 266-68 (noting that Indiana courts infrequently exclude extrinsic offense evidence on the ground that intent is not at issue).

marijuana dealing, not whether he had intentionally or knowingly done so, or whether the State had arrested the right man.¹⁷⁸

The court then analyzed and found inapplicable the identity and common scheme or plan exceptions. First, the court concluded that even if identity had been an issue, Wright's evidence did not satisfy the identity exception.¹⁷⁹ This was because that exception only makes admissible extrinsic offenses that "share enough unusual, distinctive characteristics to create a 'signature' of the perpetrator," which the prior exchange in this case did not.¹⁸⁰

Second, the court stated that to be admissible under the common scheme or plan exception, the extrinsic offense must be "so related in character, time, and place of commission as to establish some plan which embraced both."¹⁸¹ The court held that this standard was not met merely because the extrinsic offense evidence showed repetition of the charged offense close to the same time and place and between the same parties.¹⁸² It quoted with approval from *United States v. Beasley*,¹⁸³ a Seventh Circuit case that remarked, "something more than a pattern and temporal proximity is required" because "[t]he inference from 'pattern' by itself is *exactly* the forbidden inference."¹⁸⁴ The *Street* court found that the "something more" that is needed is a "tangible connection" between the offenses.¹⁸⁵

Although the court said that under this approach it would have found Wright's testimony inadmissible,¹⁸⁶ it was unable to rest its holding on a *Beasley* approach. This was because the *Street* court found that the Indiana Supreme Court in *Clark v. State*¹⁸⁷ "appear[ed] to approve a rule that in drug cases the required nexus may be shown through evidence of criminal acts linked only by repetition, provided there is proximity in time."¹⁸⁸ Instead, the *Street* court went on to hold that the common

178. *Street*, 567 N.E.2d at 1185. See also *Haynes v. State*, 578 N.E.2d 369, 370 (Ind. Ct. App. 1991) (citing *Street*, court found extrinsic drug offenses inadmissible to prove knowledge and intent when these matters were not at issue).

179. *Street*, 567 N.E.2d at 1185.

180. *Id.* at 1184.

181. *Id.* at 1185 (quoting *Gibbs v. State*, 538 N.E.2d 937, 939 (Ind. 1989)).

182. *Id.*

183. 809 F.2d 1273 (7th Cir. 1987).

184. *Id.* at 1278.

185. *Street v. State*, 567 N.E.2d 1180, 1185-86 (Ind. Ct. App. 1991) (citing *Clark v. State*, 536 N.E.2d 493, 495 (Ind. 1989)). But see *Benefiel v. State*, 578 N.E.2d 338, 346-47 (Ind. 1991) (prior attacks on other women admissible under common scheme or plan exception, in addition to other reasons, where prior attacks were merely similar to charged events and where, though six and eight years prior to it, they were deemed not to be too remote).

186. *Street*, 567 N.E.2d at 1186.

187. 536 N.E.2d 493 (Ind. 1989).

188. *Street*, 567 N.E.2d at 1186.

scheme or plan exception was not satisfied because the testimony failed to establish any plan *by the defendant* to deal in marijuana.¹⁸⁹ Wright's testimony showed that, during the second transaction with the defendant, Street offered to buy the stolen goods and in the end traded marijuana for the goods only *at Wright's suggestion*.¹⁹⁰

In contrast with the extended and largely lucid discussion of extrinsic offenses in *Street*, the supreme court's discussion in *Guenthersperger v. State*¹⁹¹ was cursory and somewhat obtuse. In *Guenthersperger*, the defendant was convicted of murdering his wife by shooting her. The supreme court upheld the trial court's admission of evidence that seven years earlier, when the couple was having difficulties and the wife was staying with friends, the defendant visited her.¹⁹² While talking with her, he fired a gunshot that hit a wall about five feet from where his wife sat.

The supreme court's rationale for finding the evidence admissible consists of a series of rules of general applicability. Apart from citations, and an explanation that prior assaults and threats are no less admissible than prior batteries, that rationale reads, in its entirety:

Evidence of uncharged misconduct is admissible to show intent, motive, common scheme or plan, or identity. Evidence of a defendant's prior assaults, batteries, or threats against a homicide victim is admissible to prove motive. We have also said that motive is always relevant in the proof of a crime. Identity was an issue in this case because appellant filed a notice of alibi and claimed that he was not the person who perpetrated the crime.¹⁹³

This analysis leaves much to be desired. For example, it is difficult to grasp why the prior incident tended to prove a motive for a crime that occurred seven years later. Moreover, the statement "motive is always relevant in the proof of a crime" does not explain why motive evidence is admissible in this case. If the statement means that motive is always provable, there would be no need for the general rule of extrinsic offenses or any of the other exceptions to it because prior bad acts would always be admissible in criminal trials.¹⁹⁴ A final problem with the court's analysis

189. *Id.* at 1187.

190. *Id.* It is this finding that makes *Street* reconcilable with *Hawn v. State*, 565 N.E.2d 362 (Ind. Ct. App. 1991), a recent case which held admissible the prior drug dealings of a defendant charged with later drug offenses, where the uncharged acts occurred within a year of the charged ones, "and the circumstances tended to prove a common scheme or plan of drug dealing." *Id.* at 365.

191. 566 N.E.2d 61 (Ind. 1991).

192. *Id.* at 62.

193. *Id.* (citations omitted).

194. *Johnson v. State*, 260 N.E.2d 782 (Ind. 1970), which *Guenthersperger* cites

is that the court's description of the two incidents fails to establish the "signature" or "modus operandi" normally required to make an extrinsic offense admissible to show identity.¹⁹⁵

A new statute adopted by the Indiana legislature in 1991 adds procedural burdens for certain uses of the extrinsic evidence rule.¹⁹⁶ The statute first states that in trials for battery, aggravated battery, murder, and voluntary manslaughter, "evidence of a previous battery is admissible into the state's case-in-chief for purposes of proving motive, intent, identity, or common scheme and design."¹⁹⁷ The prior battery is admissible even if no charges were filed,¹⁹⁸ but the statute only affects prior batteries less than five years old.¹⁹⁹

The purpose and effect of these substantive provisions are unclear. The common-law rules of extrinsic offenses are broader and make all extrinsic offenses, charged or uncharged, admissible to prove motive, intent, identity, or common scheme and plan in any trial.²⁰⁰ It is clear, however, that the statute is not intended to restrict the use of extrinsic offense evidence because it expressly states that it "shall not be construed to limit the admissibility of evidence of a previous battery in any civil or criminal proceeding."²⁰¹

On the other hand, the statute may have the effect of expanding the common-law rules somewhat if, for example, it is interpreted to limit judicial discretion to find irrelevant and hence inadmissible a four-year-old battery committed under different circumstances from the charged offense. However, such interpretations would probably be incorrect, given that the statute only makes the prior batteries admissible "to prove"

for the proposition that motive is always relevant in the proof of the crime, clearly did not mean that motive is always provable. After stating the proposition in the shorthand way copied by *Guenthersperger*, *Johnson* then elaborated by quoting an expanded statement of the rule which specifies that motive must be in issue. *Id.* at 785.

195. See, e.g., *Brown v. State*, 577 N.E.2d 221 (Ind. 1991) (evidence of prior murder admissible under "identity/modus operandi" exception in trial for murder and child molesting, when in both cases victims were young, black girls who were walked away by a man and a woman to a secluded area, when both died of asphyxia by strangulation, when pieces of a bedsheet were found at the scenes of both crimes, and when strips of cloth from both victims' shirts were found torn into strips and knotted); *Byrd v. State*, 579 N.E.2d 457 (Ind. Ct. App. 1991) (evidence that defendant killed enemy troops in Vietnam by grinding their faces into the dirt in exactly the same manner as victim was killed admissible under identity exception). See generally 12 INDIANA PRACTICE, *supra* note 120, § 404.214.

196. IND. CODE § 35-37-4-14 (1988) (adopted May 12, 1991, and made effective July 1, 1991, by IND. CODE § 1-1-3-3 1988).

197. *Id.* § 35-37-4-14(c).

198. *Id.* § 35-37-4-14(a).

199. *Id.* § 35-37-4-14(b).

200. See 12 INDIANA PRACTICE, *supra* note 120, § 404.201.

201. IND. CODE § 35-37-4-14(e) (1988).

motive. This language appears to leave a court room to find that a prior battery does not "prove," that is, is not relevant to, motive. Moreover, because *Guenthersperger* demonstrates that Indiana courts have no trouble finding even seven-year-old offenses relevant,²⁰² it is difficult to see the time provision as an expansion of existing law.

The procedural requirements of the statute are new, however, and may prove burdensome to the courts. They include a requirement that if the State plans to use evidence covered by the statute it file a written notice ten days before trial, together with an affidavit stating an offer of proof; a requirement that, if the court finds the written offer sufficient it hold a hearing on the offer of proof out of the jury's hearing; and a requirement that the court make an order detailing what evidence is admissible and the type of questions that are permissible.²⁰³

I. Real and Demonstrative Evidence

The admissibility of transparent overlays was analyzed in *Solomon v. State*,²⁰⁴ an appeal from a conviction for attempted murder, resisting law enforcement, and criminal mischief. During the trial, both prosecution and defense used not-to-scale drawings of the streets where the events at issue took place, with transparent overlays placed on top.²⁰⁵ Both sides drew markings on the transparencies to indicate various locations and movements.²⁰⁶ Because the overlays were admitted into evidence without objection, Solomon argued on appeal that the admission of these overlays constituted fundamental error in that the markings on the overlays, drawn to illustrate testimony, lacked communicative content in themselves and hence could not be subjected to appellate review.²⁰⁷

The court of appeals agreed that the overlays lacked communicative content and were not subject to appellate review but nonetheless found that their admission did not constitute fundamental error and further found that it would not likely amount to any error at all.²⁰⁸ "Charts and drawings may be admitted into evidence if they are reasonably accurate and likely to help a jury understand testimony; such exhibits need not be perfect representations, and their admissibility is a matter of trial judge discretion."²⁰⁹ The court reasoned that because drawings and charts could lack expressive value just as these overlays had and because such charts

202. See *supra* text accompanying notes 191-93.

203. IND. CODE § 35-37-4-14(d) (1988).

204. 570 N.E.2d 1293 (Ind. Ct. App. 1991).

205. *Id.* at 1297.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* (citations omitted).

and drawings were not condemned, there was no reason to foreclose use of the overlays.²¹⁰ The court also apparently rejected insusceptibility to appellate review as a basis for objecting to the admission of exhibits.²¹¹

J. Preserving Error

In 1991, Indiana courts provided guidance to trial lawyers on preserving error and raising objections in various contexts. *Osborne v. Wenger*²¹² presented the issue of whether the failure to raise a "competency of the evidence" objection at a deposition results in a waiver of the right to object at trial to the admission of that portion of the deposition. The Third District Court of Appeals, in holding that the objection had not been waived,²¹³ construed the exception to Trial Rule 32(D)(3)(a). That rule, with its exception, states, "Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time."²¹⁴

Osborne sought at trial to admit a medical expert's deposition testimony that Osborne was "uninsurable and therefore unemployable."²¹⁵ Wenger sought to exclude the testimony on the grounds that the doctor was not qualified to opine on insurability and that the testimony was prejudicial, but he had failed to raise these objections at the deposition when the question eliciting the doctor's opinion on insurability and employability was asked. The appellate court said the burden was on Osborne to show that the doctor possessed the necessary credentials to render his opinion admissible and, therefore, that an objection presented at the deposition would have "obviated or removed" the ground for the objection.²¹⁶

In *Smith v. State*,²¹⁷ the supreme court found a defendant's continuing objection sufficient to preserve for appeal the issue of the admissibility of the fruits of an allegedly illegal search and seizure.²¹⁸ The trial court had held a hearing on the defendant's motion to suppress in open court and on the record. At the end of the hearing, the trial court denied the motion to suppress and granted the defendant's request to show a continuing objection. The defendant repeated his continuing objection when-

210. *Id.* at 1297-98.

211. *Id.*

212. 572 N.E.2d 1343 (Ind. Ct. App. 1991).

213. *Id.* at 1344.

214. IND. TRIAL R. 32(D)(3)(a).

215. *Osborne*, 572 N.E.2d at 1344.

216. *Id.* at 1345.

217. 565 N.E.2d 1059 (Ind. 1991).

218. *Id.* at 1061.

ever evidence to which it pertained was used by the State. The defendant did not, however, restate his grounds for objecting; he merely referred to the grounds "previously raised." In finding this continuing objection sufficient because it referred to grounds stated on the record in open court, the *Smith* court distinguished a defendant's continuing objection made "for reasons that we previously argued in chambers," which had been found insufficient in *Abner v. State*.²¹⁹

K. Miscellaneous Indiana Decisions of Note

Certain other decisions issued by Indiana courts in 1991 are also worth mentioning. In *Reed v. Dillon*,²²⁰ the court of appeals held that a motion to strike a document from the record may remove that document from the record, but does not bar introduction of the document into evidence at some later point in the proceedings.²²¹

In *Smith v. State*,²²² the Second District Court of Appeals dealt with the issue of whether a juvenile was convicted of robbery based on an allegedly involuntary confession. The defendant made this confession after a twenty minute consultation with his mother, after which both he and his mother signed waivers of their rights.²²³ Under Indiana Code section 31-6-7-3(a)(2), the juvenile's rights could be "knowingly and voluntarily" waived by a mutual act of the juvenile and the custodial parent after a "meaningful consultation."²²⁴ In this case, Smith alleged that his mother misunderstood the ramifications of the statement made to her by police that Smith's companion, but not Smith, had been identified.²²⁵

Pursuant to Indiana Code Section 31-6-7-3(d)(2), the court treated the mother's alleged misunderstanding as "a factor affecting the voluntariness of the confession."²²⁶ The court, in evaluating the "totality of the circumstances," doubted that the mother lacked an appreciation of the effect of her son's confession and found that the evidence supported the trial court's conclusion that the defendant's rights were waived.²²⁷

II. FEDERAL DEVELOPMENTS

A. Rule 403 Balancing

Two 1991 decisions by the Seventh Circuit describe interesting applications of the Rule 403 balancing test.²²⁸ In *United States v.*

219. 479 N.E.2d 1254, 1259 (Ind. 1985).

220. 566 N.E.2d 585 (Ind. Ct. App. 1991).

221. *Id.* at 588.

222. 580 N.E.2d 298 (Ind. Ct. App. 1991).

223. *Id.* at 300.

224. See IND. CODE § 31-6-7-3(a)(2) (1988).

225. *Id.* at 300-01.

226. *Id.* at 300.

227. *Id.* at 301.

228. The rule provides, "Although relevant, evidence may be excluded if its probative

Masters,²²⁹ the court of appeals held that the trial court did not abuse its discretion in refusing to allow the defense to cross-examine a witness in detail concerning his habit of wearing women's underwear.²³⁰ The defendants maintained that they were innocent of a woman's murder and claimed, based on the witness's habit and on the absence of underpants on the victim, that the witness had killed her for the missing underpants. After the witness, in response to a defense question, admitted his habit, the trial judge cut off further questioning.

The Seventh Circuit found that the details of the witness's habit were properly excluded under Rule 403.²³¹ It reasoned that because there was no indication that violence was an aspect of transvestism in general or the witness's habit in particular, the details were "peripheral."²³² The court of appeals also noted that the defense's theory of the murder was "hardly . . . impressive,"²³³ since women's underwear is readily available for purchase and need not be acquired through murder.

In *United States v. Allen*,²³⁴ the Seventh Circuit held that the trial court did not abuse its discretion under Rule 403 in allowing a government witness to correct in court her earlier misidentification of the defendant, which was also given in court.²³⁵ The Seventh Circuit held that there was no substantial danger of unfair prejudice or of misleading the jury, where both identifications were made before the jury, where the defense and prosecution were permitted to explore the discrepancy thoroughly on cross and on redirect examination, and where there was no indication that the witness had been coached to change her testimony.²³⁶

B. Sequestration of Witnesses

In *United States v. Hargrove*,²³⁷ the Seventh Circuit rejected a defendant's claim that the trial court should have excluded the testimony of a government witness who was present during the testimony of another

value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

229. 924 F.2d 1362 (7th Cir. 1991).

230. *Id.* at 1368.

231. *Id.*

232. *Id.*

233. *Id.*

234. 930 F.2d 1270 (7th Cir. 1991).

235. *Id.*

236. *Id.* at 1273.

237. 929 F.2d 316 (7th Cir. 1991).

government witness she was called to contradict because the trial court had entered a sequestration order pursuant to Rule 615.²³⁸ The government had called Baker, a paralegal present at the FBI's interview of Beckett, to rebut Beckett's courtroom testimony, which Baker had heard, that Beckett was coerced to name the defendant as his drug source.

The court found that Baker's testimony did not contravene the purpose of Rule 615, which "is to prevent witnesses from tailoring their testimony to that which has already been presented and to help in detecting testimony that is less than candid."²³⁹ This was because Baker's testimony was in rebuttal to Beckett's and not in conformance with his, because Baker did not testify concerning the substance of Beckett's interview with the FBI but only concerning the lack of coercion during it, and because the government had no intention of calling Baker until Beckett asserted coercion on the stand.²⁴⁰

C. *Opinions on the Ultimate Issue*

In *United States v. Foster*,²⁴¹ the Seventh Circuit addressed the interplay between Rule 704(b) and expert testimony on drug courier profiles. The issue at trial was whether Foster knew he was carrying drugs. The court held that a DEA agent's expert testimony that Foster fit the drug courier profile did not violate Rule 704(b)'s prohibition on experts testifying as to whether the defendant had the mental state required of the crime charged.²⁴² The court reasoned that the testimony was permissible because the agent did not specifically opine that Foster had the requisite state of mind.²⁴³ The testimony "merely assisted the jury in coming to a conclusion as to Foster's mental state [but] did not make that conclusion for them."²⁴⁴

D. *Notable United States Supreme Court Decisions*

Certain rulings by the United States Supreme Court in 1991 should also be mentioned. In *Arizona v. Fulminante*,²⁴⁵ the Supreme Court, in a five to four decision, announced that the admission of coerced confessions would be subject to a harmless error analysis, based on Justice

238. That rule provides, "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. . . ." FED. R. EVID. 615.

239. *Hargrove*, 929 F.2d at 320.

240. *Id.* at 320-21.

241. 939 F.2d 445 (7th Cir. 1991).

242. *Id.* at 454.

243. *Id.*

244. *Id.*

245. 111 S. Ct. 1246 (1991).

Rehnquist's characterization of such errors as "error in the trial process," rather than a "structural defect affecting the framework within which the trial proceeds."²⁴⁶ In *Payne v. Tennessee*,²⁴⁷ the Supreme Court abandoned its previous decisions in *Booth v. Maryland*²⁴⁸ and *South Carolina v. Gathers*²⁴⁹ and held that the Eighth Amendment to the United States Constitution does not *per se* bar the introduction of victim impact evidence at the penalty phase of a capital trial.²⁵⁰

III. CONCLUSION

As this Article demonstrates, a number of evidentiary developments occurred in 1991. Readers should understand, however, that while the Article addresses some of the more significant topics, it is not intended to be comprehensive.

246. *Id.* at 1264-65.

247. 111 S. Ct. 2597 (1991).

248. 482 U.S. 496 (1987).

249. 490 U.S. 805 (1989).

250. *Payne*, 111 S. Ct. at 2608.

The Continuing Evolution of Indiana's Family Law in 1991

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INTRODUCTION

During this survey period, the Indiana appellate courts issued more than sixty reported decisions in the traditional "family law" areas: dissolution of marriage, custody, visitation, paternity, adoption, and support. Many of the decisions applied established precedent with predictable results. There were also decisions furthering recent developments in our courts' attempts to deal with contemporary societal concerns: fairness in property distributions, the extent of a divorced parent's obligation to provide for his children, the effect of marital misconduct, including the possible transmission of the HIV virus, and the standards for placing mistreated children with private third parties who seek custody from natural parents. On the federal level, the United States Supreme Court decided an important case clarifying the dischargeability of a judgment lien arising from a property distribution order.

New legislation has been enacted that focuses on children and related issues. One act establishes a committee of judges, legislators, professionals, and a custodial and noncustodial parent to review annually the Child Support Guidelines and make recommendations to the Indiana Supreme Court. The cases and legislation reviewed contribute to the clarification or development of the primary incidents of family law.

I. PROPERTY DISTRIBUTION

Arguably, the most significant developments in family law involve property distribution in dissolution proceedings. Whether an asset is includible in the marital estate, its value and its distribution are the primary concerns. Although most of these cases clarify the issues, some continue to pose questions that need to be revisited.

A. Is It Marital Property?

The court of appeals has continued the trend toward recognizing antenuptial agreements. In a rather bold, somewhat surprising decision,

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the court extended the analysis to a post-nuptial reconciliation agreement.

In *DeHaan v. DeHaan*,¹ the First District Court of Appeals held that the parties' antenuptial agreement did not prevent disposition of company stock as marital property.² The two page "Marital Property Agreement," executed prior to marriage, spoke only to alimony and child support and did not address division of marital assets.³

The value of the wife's estate on the date of marriage was not mentioned in the agreement. Although the agreement stated the value of the husband's estate to be \$250,000, it otherwise failed to mention property or property settlement.⁴ The trial court found that the parties' agreement barred only the wife's claim to spousal support, not her claim to his property, and would be unconscionable if it did. The court rejected the husband's argument that "alimony" referred to property at the time the agreement was entered.⁵ The Indiana Supreme Court decision in *In re Boren*⁶ was found inapplicable because the agreement in that case included language specifically addressing the parties' rights regarding property each had brought into the marriage or acquired thereafter.⁷

In *Flansburg v. Flansburg*⁸ the Third District Court of Appeals, in a case of first impression, affirmed the trial court's application of the law of antenuptial contracts to a post-nuptial reconciliation agreement that was supported by sufficient consideration and not procured by fraud.⁹ Although labeled a "Post-Nuptial Agreement," the settlement was negotiated by the parties well into their marriage to facilitate reconciliation and primarily concerned distribution of property acquired prior to marriage. Citing law from other jurisdictions, the court of appeals held that just as marriage is adequate consideration for an antenuptial agreement, the extension of a marriage that would have been dissolved but for execution of an agreement to reconcile is adequate consideration for a post-nuptial contract.¹⁰ The court noted that the wife had counsel and entered into the contract voluntarily with full knowledge

1. 572 N.E.2d 1315 (Ind. Ct. App. 1991).

2. *Id.* at 1323.

3. *Id.* at 1318, 1321.

4. *Id.* at 1321-22.

5. *Id.*

6. 475 N.E.2d 690 (Ind. 1985).

7. *DeHaan v. DeHann*, 572 N.E.2d 1315, 1322 (Ind. Ct. App. 1991).

8. 581 N.E.2d 430 (Ind. Ct. App. 1991).

9. *Id.* at 437.

10. *Id.* at 433. The court cited: *Stadther v. Stadther*, 526 S.2d 598 (Ala. Civ. App. 1988); *Hanner v. Hanner*, 388 P.2d 239 (Ariz. 1964); *Curry v. Curry*, 392 S.E.2d 879, 880 (Ga. Ct. App. 1990); *Gilley v. Gilley*, 778 S.W.2d 862, 863 (Tenn. Ct. App. 1989); *Yeich v. Yeich*, 399 S.E.2d 170 (Va. Ct. App. 1990).

of her husband's financial status.¹¹ In a sweeping conclusion, the court found that "a reconciliation agreement may be enforced as long as it is entered into freely and without fraud or misrepresentation, or is not otherwise unconscionable."¹² The court did not indicate what factors may lead to a finding of unconscionability or whether this is measured by reference to the parties' assets at the time of execution or at the time a dissolution action is filed. It is unclear how the extension of a marriage that was not dissolved provides adequate consideration. If the marriage had failed one month later would the court's decision have been different?¹³ In a prenuptial agreement it is not the promise of a lasting marriage that provides the required consideration, but the promise to marry. Also, the court did not draw a distinction between post-nuptial agreements and reconciliation agreements.

A strong dissent by Judge Garrard revealed that he would have reversed and remanded the case because the agreement was not an antenuptial agreement and the policy reasons supporting the validity of agreements entered into in contemplation of an impending marriage were not present.¹⁴ The agreement was not validated by the dissolution statute regarding property settlement agreements because it was not entered into "attendant upon the dissolution of their marriage"¹⁵ and because there was no language in the agreement that the parties wished to reconcile and make their marriage work. It merely permitted the wife to return home with her daughter if she paid one-half of ongoing living expenses and relinquished any claim to her husband's property. Judge Garrard believed that the impact of the agreement impeded rather than promoted honest efforts at reconciliation.¹⁶ Due to the problem of finding valid consideration and the distinction between public policy supporting pre-nuptial agreements and reconciliation agreements, this decision may be reversed by the Indiana Supreme Court.¹⁷

Recent pension cases address whether benefits are marital property. In *Staller v. Staller*,¹⁸ the husband appealed the trial court's inclusion of a portion of his thrift and profit sharing plans as a marital asset, complaining that a portion of those benefits did not vest until after the date of filing. The court of appeals affirmed the trial court's inclusion

11. *Flansburg*, 581 N.E.2d at 433.

12. *Id.* at 437.

13. In this case the parties reconciled and remained married for three years.

14. *Flansburg v. Flansburg*, 581 N.E.2d 430, 437 (Ind. Ct. App. 1991) (citing *In Re Marriage of Boren*, 475 N.E.2d 690 (Ind. 1985)).

15. See IND. CODE § 31-1-11.5-10 (1988).

16. *Flansburg*, 581 N.E.2d at 437 (Garrard, J., dissenting).

17. A Petition to Transfer and Brief in Opposition have been filed.

18. 570 N.E.2d 1328 (Ind. Ct. App. 1991).

of all plan benefits as marital assets.¹⁹ Citing *In re Marriage of Adams*,²⁰ the court held that when the plan is an element of property acquired by the joint efforts of the parties and the right to the property is vested prior to the final decree, the plan is properly a marital asset.²¹

In *In re Marriage of Battles*,²² the court of appeals affirmed the trial court's exclusion of a husband's military benefits from the marital pot because at the time of the final hearing, he was not yet eligible to retire and had no vested interest in his military pension.²³ A military pension falls within the ambit of Indiana Code section 31-1-11.5-2(d)(3) and requires, for inclusion in the marital pot, that the right to receive disposable retired or retainer pay be acquired during the marriage.²⁴

B. What Is It Worth?

The court of appeals continues to hold that only those tax consequences necessarily arising as a direct result of the property disposition may be considered when valuing assets. Two recent decisions illustrate how narrow this area is becoming. In *DeHaan v. DeHaan*,²⁵ the trial court was held to have abused its discretion in considering future capital gains tax from the potential resale of low basis stock in a closely held corporation.²⁶ The court based its decision on the fact that the wife's future sale of the stock was remote and not a direct consequence of the property disposition itself.²⁷ The court cited *Harlan v. Harlan*²⁸ as dispositive and noted that the holding in *Harlan* is broad and not limited to the facts of that case.²⁹ *DeHaan* is quite significant because the difference in value attributable to potential income tax on capital gains was over twenty million dollars, and the court rejected the wife's argument that a distinction should be drawn between a "taxable event," which

19. *Id.* at 1332.

20. 535 N.E.2d 124 (Ind. 1989). The court held that the husband's police pension benefits, which did not become nonforfeitable upon termination of employment until three months after he filed for divorce, and prior to trial, were properly included as a marital asset subject to distribution. See IND. CODE § 31-1-11.5-2(d)(2) (1988).

21. *Staller*, 570 N.E.2d at 1331-32.

22. 564 N.E.2d 565 (Ind. Ct. App. 1991).

23. *Id.* at 566-67.

24. Ind. Code § 31-1-11.5-2(d)(3) (1988).

25. 572 N.E.2d 1315 (Ind. Ct. App. 1991).

26. *Id.* at 1327.

27. *Id.*

28. 560 N.E.2d 1246 (Ind. 1990) (affirming the court of appeals' holding in *Harlan v. Harlan*, 544 N.E.2d 553, 555 (Ind. Ct. App. 1989), that Indiana Code § 31-1-11.5-11.1 (1988), requires the trial court to consider only the direct or inherent and necessarily incurred tax consequences of the property disposition).

29. *DeHann*, 572 N.E.2d at 1327.

appears to be required, and a "tax consequence" that would be realized upon her future sale of the stock.³⁰

Likewise, in *Granger v. Granger*³¹ the trial court was reversed on appeal for deducting a possible tax liability arising from the sale of the husband's laundromats.³² The Second District Court of Appeals held that the marital estate could not be reduced by \$53,200 for the anticipated tax liability from a possible future sale of laundromats the husband claimed he intended to sell.³³ Only those tax consequences necessarily arising from the plan of distribution were to be taken into account.³⁴ Although the court noted that the laundromats were not ordered sold and the husband could borrow money to meet his obligations under the property division if his income became insufficient, the facts did suggest sale was imminent. The court may have been stretching a bit when it emphasized that "[t]he record does not establish the sale of *both laundromats* was an immediate consequence of the property disposition."³⁵

In *Staller v. Staller*³⁶ the court of appeals held that the trial court did not abuse its discretion in valuing a husband's pension plan at his earliest unreduced retirement date.³⁷ On appeal, the husband complained that the court's decision would require him to retire early to preserve his wife's share of the pension plan. The appellate court rejected this argument, holding that the trial court had merely assigned the wife a one-half interest in her husband's pension benefits that accrued during the course of the parties' marriage.³⁸ She had not been given an immediate right to the value of the pension. The court was careful to distinguish *In re Marriage of Adams*,³⁹ and held that the trial court's order did not impose an early retirement date.⁴⁰

30. *Id.* See Ind. Code § 31-1-11.5-11.1 (1988) which states that the court, in determining what is just and reasonable in dividing property, shall consider the tax consequences of the property distribution with respect to the present and future economic circumstances of each party.

31. 579 N.E.2d 1319 (Ind. Ct. App. 1991).

32. *Id.* at 1321.

33. *Id.*

34. *Id.* at 1320.

35. *Id.* at 1321. Because transfers of property between divorcing spouses are nontaxable events pursuant to 26 U.S.C. § 1041(a) (1988), it would appear that the only time tax consequences will be properly considered is when sale of an asset is ordered by the court as part of the property division.

36. 570 N.E.2d 1328 (Ind. Ct. App. 1991).

37. *Id.* at 1332.

38. *Id.*

39. 535 N.E.2d 124 (Ind. 1989) (remanded to clarify the commencement date for payment of police pension benefits to wife where husband had already attained the earliest retirement age under the plan but had not retired and the trial court's order directed the plan to immediately commence payments to wife).

40. *Staller*, 570 N.E.2d at 1332.

C. *How Should Property Be Distributed?*

More than three years after the 1987 amendment to Indiana Code section 31-1-11.5-11(c)⁴¹ to provide a rebuttable presumption that an equal division of marital property is just and reasonable, all five district courts of appeal have issued opinions that discuss the adequacy of the trial court's findings supporting unequal distribution.⁴²

Two general principles are emerging. First, a reviewing court will not reverse an unequal property division if the deviation is insubstantial.⁴³ Second, it appears that the trial court's obligation to explain the basis for an unequal division is more exacting when a request for findings of fact is made pursuant to Indiana Trial Rule 52.⁴⁴ There is considerable disagreement, however, as to what is an insubstantial deviation.

In *Seslar v. Seslar*,⁴⁵ a husband appealed the trial court's property distribution awarding his wife eighty-five percent of the net marital assets. He claimed the findings were inadequate. In fact, the trial court made extensive findings, pursuant to the husband's Trial Rule 52 request, concerning the relevance of the parties' cohabitation prior to marriage, the pattern of joint contribution during cohabitation and marriage, and the wife's consistently greater earnings throughout the marriage.

Judge Miller, writing for the Fourth District, stated that the findings were ambiguous and did not inform the court why or how the various facts determined by the trial court affected the property distribution.⁴⁶ The trial court's findings failed to expressly justify a departure from an equal division. The court noted that "[i]n *Kirkman v. Kirkman*, where special findings were not requested, our supreme court held that

41. Indiana Code § 31-1-11.5-11(c) (Supp. 1991), provides in part, "[t]he court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable. . . ." Subsection 11(c) then provides five considerations, including the contributions of each spouse to the acquisition of property: the extent that property was acquired prior to marriage or through inheritance or gift, the economic circumstances of the parties at the time of disposition and the desirability of awarding the family residence to the spouse having custody of any children, the conduct of the parties as it relates to disposition or dissipation of assets, and the earnings or earning ability of the parties.

42. *Riddle v. Riddle*, 566 N.E.2d 78 (Ind. Ct. App. 1991); *Norton v. Norton*, 573 N.E.2d 941 (Ind. Ct. App. 1991); *Cox v. Cox*, 580 N.E.2d 344 (Ind. Ct. App. 1991); *Staller v. Staller*, 570 N.E.2d 1328 (Ind. Ct. App. 1991); *Seslar v. Seslar*, 569 N.E.2d 380 (Ind. Ct. App. 1991); *Marriage of Snemis*, 575 N.E.2d 650 (Ind. Ct. App. 1991).

43. *Kirkman v. Kirkman*, 555 N.E.2d 1293, 1294 (Ind. 1990); *Cox v. Cox*, 580 N.E.2d 344, 350 (Ind. Ct. App. 1991).

44. *Seslar v. Seslar*, 576 N.E.2d 1330, 1332 (Ind. Ct. App. 1991).

45. 569 N.E.2d 380 (Ind. Ct. App. 1991).

46. *Id.* at 383.

'express trial court findings will not be compelled for insubstantial deviations from precise mathematical equality.' However, *Kirkman* does not indicate what magnitude of disparity will trigger the specific finding requirement."⁴⁷ Also, *Kirkman* does not indicate whether express findings must support merely an unequal distribution or must explicitly explain the reasons for an unequal division.

On rehearing, the court left no doubt that *Seslar* stands for the proposition that a more exacting explanation of the basis for an unequal distribution is required when special findings of fact are requested:

Next, Claudia claims there is a conflict between our decision in *Seslar* and other decisions in the first and third districts of this court handed down before and after *Seslar*. Specifically, she cites *Riddle v. Riddle* for the proposition that "it is unnecessary for the trial court to state its reasons for deviating from the statutory presumption, but articulation on the record of relevant evidence is sufficient to support an unequal division of property." She also cites *Staller v. Staller* as contrary to our holding in *Seslar*. We have reviewed these cases and find that there was no mention of a request, pursuant to T.R. 52, for findings of fact.⁴⁸

A trial court's task concerning an unequal distribution under Indiana Code section 31-1-11.5-11(c) is now apparent: "express trial court findings will not be compelled for insubstantial deviations from precise mathematical equality"⁴⁹ in the division of marital property. However, when special findings of fact have been requested pursuant to Indiana Trial Rule 52, "[s]pecial findings [must] provide the parties *and the reviewing court* with a theory on which the trial court decided the case so that the right to review may be effectively preserved."⁵⁰ It appears that Indiana appellate courts will review on a case-by-case basis whether the trial court, in the absence of a request for special findings, has articulated a sufficient basis for an unequal division and whether the deviation is insubstantial.⁵¹

47. *Id.* (citation omitted).

48. *Seslar*, 576 N.E.2d at 1332 (citations omitted).

49. *Kirkman v. Kirkman*, 555 N.E.2d 1293, 1294 (Ind. 1990).

50. *Seslar*, 569 N.E.2d at 383.

51. *Cf. Staller v. Staller*, 570 N.E.2d 1328 (Ind. Ct. App. 1991) (trial court adequately supported its determination and did not abuse its discretion in making a 60/40 split); *Cox v. Cox*, 580 N.E.2d 344 (Ind. Ct. App. 1991) (55/45 split was an insubstantial deviation). *But see Cox*, 580 N.E.2d at 353 (Rucker, J., dissenting) (the disparity in *Cox* was greater than the disparity in *Euler v. Euler*, 537 N.E.2d 555 (Ind. Ct. App. 1989)); *In re Marriage of Davidson*, 540 N.E.2d 641 (Ind. Ct. App. 1989); *R.E.G. v. L.M.G.*, 571 N.E.2d 298 (Ind. Ct. App. 1991) (60/40 split amounting to \$50,000.00 deviation from equality was not insubstantial).

In *Board of Trustees v. Grannan*⁵² the Fourth District Court of Appeals held a Qualified Domestic Relations Order (QDRO) dividing a husband's Public Employee Retirement Fund (PERF) benefits defective and remanded the cause to the trial court for modification.⁵³ The appellate court held that the trial court improperly ordered the direct distribution of the husband's benefits to the wife in violation of the State Public Employee's Retirement Fund statute that prohibits attachment or assignment of benefits.⁵⁴ The trial court also improperly ordered the husband's benefits to be distributed at his earliest eligibility date, thereby forcing him to retire early or forcing the Fund to pay retirement benefits before his actual retirement.⁵⁵ Relying upon rules of statutory construction to determine whether the QDRO could order the assignment of benefits despite the prohibition in the PERF statutes, the court concluded that the portion of the trial court's order requiring action in violation of the plan's provisions was invalid.⁵⁶ The order was precluded not only by the plan's provisions, but by the QDRO that indicated that it should not be construed to require the plan or plan administrator to provide any type or form of benefit or any option not otherwise provided under the plan.⁵⁷

At the same time, the court held, as did the supreme court in *Adams*, that the dissolution statutes and state statutes giving rise to the plan could be construed harmoniously.⁵⁸ Indiana Code section 31-1-11.5-11(b)(4) authorizes the division of expected future pension benefits "by setting aside to either of the parties a percentage of those payments either by assignment or in kind at the time of receipt."⁵⁹ Although the trial court erred in ordering an assignment of benefits, a distribution of those benefits could still be effectuated by payments in kind at the time of receipt.⁶⁰ The appellate court held the *Adams* decision dispositive regarding the issue of forced early retirement.⁶¹

52. 578 N.E.2d 371 (Ind. Ct. App. 1991).

53. *Id.* at 376.

54. *Id.* at 372.

55. *Id.* at 374, 376. The QDRO provided:

The Plan will pay directly to the Alternate Payee her share of benefits in the full amount to which she is entitled. . . . The Alternate Payee shall have the right to elect to receive benefit payments under the Plan at the earlier of 1) any time beginning when the Participant attains (or would have attained) earliest retirement age under the Plan, as defined by IRC §414 (p)(4), or, 2) at any time otherwise permitted by law or the plan.

Id. at 373.

56. *Id.* at 374.

57. *Id.*

58. *Id.* at 375.

59. IND. CODE § 31-1-11.5-11(b)(4) (1988).

60. *Board of Trustees v. Grannan*, 578 N.E.2d 371, 376 (Ind. Ct. App. 1991).

61. *Id.* at 376-77 (citing *In re Marriage of Adams*, 535 N.E.2d 124, 127 (Ind. Ct. App. 1991)).

In *Riddle v. Riddle*,⁶² the husband appealed several issues regarding the dissolution of his marriage. Specifically, he challenged the award to his wife of forty percent of a monthly annuity payment and the survivor benefit from a structured settlement fund arising out of the husband's automobile accident. The annuity and marital residence were the primary assets of the marriage. There was no dispute that the annuity fund was subject to distribution. The appellate court noted there was no error in including the annuity because the husband's right to receive it was absolute prior to the filing of the petition, and the total value of the annuity was fixed, readily ascertainable, and payable regardless of whether he survived.⁶³ The husband claimed error because the trial court also awarded his wife the survivor benefit.⁶⁴

The court emphasized that the legislature's intent in enacting the property distribution statute was to insure that all property rights are settled with certainty at the time of dissolution, whether the award is made by payment of a lump sum, installments, or a transfer of property.⁶⁵ A trial court must dispose of all marital property in one final settlement. No part of the distribution may be conditioned upon a subsequent change in circumstances.⁶⁶ The court concluded its analysis by holding:

[The husband's] receipt of any of the monies awarded him is contingent upon his continued survival. Should he die tomorrow, neither he nor his estate will have received his full share of the marital assets while Shirley will have received far more than the trial court could have reasonably intended.

This is not to say that the annuity in question does not constitute a present vested interest which is subject to division. Rather, as Raymond argues, the manner in which the trial court chose to award the asset fails to comport with statutory requirements. Had the trial court awarded Raymond the entire annuity including the survivorship benefit and Shirley a cash award payable in installments with interest, the award would have achieved the division with the certainty required by Indiana law.⁶⁷

62. 566 N.E.2d 78 (Ind. Ct. App. 1991).

63. *Id.* at 81.

64. The annuity, without regard to the survivor benefit, was valued at \$402,000. The survivor benefit had not been valued.

65. *Riddle*, 566 N.E.2d at 81.

66. *Id.* (citing *Waggoner v. Waggoner*, 531 N.E.2d 1188, 1189 (Ind. Ct. App. 1988); *Murphy v. Murphy*, 510 N.E.2d 235, 237 (Ind. Ct. App. 1987)).

67. *Riddle v. Riddle*, 566 N.E.2d 78, 82 (Ind. Ct. App. 1991).

In a concurring opinion, Judge Shields offered the alternative of awarding a proportional share of the annuity to each party including the survivor benefits, which could be accomplished by indicating that each party *and his or her designated beneficiary* would receive the proportionate share of each monthly benefit.⁶⁸ Although this alternative might be possible when the asset is a structured settlement annuity, federal law precludes division of a qualified joint and survivor annuity in the context of a QDRO dividing qualified private pension plan benefits.⁶⁹

D. "No Fault" Means No Fault

In this age of pervasive societal concern over acquired immune deficiency syndrome (AIDS), the temptation to base property distribution on a possible transmission of the HIV virus, despite Indiana's "no fault" divorce statute, was too great for the trial court in *R.E.G. v. L.M.G.*⁷⁰ In a principled and meticulously reasoned decision, Judge Robertson inexorably reduced the basis of the trial court's reasoning for the uneven division of property to perceived marital misconduct.

In *R.E.G.*, the husband appealed the distribution of sixty percent of the marital assets to his wife which was based, at least in part, upon the trial court's finding that the husband's homosexual relationships may have placed his wife at risk for developing AIDS. At the outset, Judge Robertson noted that express trial court findings will not be compelled for an insubstantial deviation from precise mathematical equality⁷¹ and that the case did not involve an insubstantial deviation because the deviation was approximately \$50,000.⁷²

Judge Robertson proceeded to dismantle the trial court's fault-based rationale:

We must also note at the outset that the trial court has expressly based its decision—at least in part—upon fault. Simply stated, we will not tolerate the injection of fault into modern dissolution proceedings. The Indiana Dissolution of Marriage Act which was adopted in 1971 expressly abolished the previously existing grounds for divorce which required a finding of fault on the part of one of the spouses. . . . Frankly, we are quite surprised that after twenty (20) years' experience under the "new" Act, we are required to state that the conduct of the parties during the

68. *Id.* at 84 (Shields, J., concurring).

69. William M. Troyan, *Drafting and Qualifying a Court Order in a Domestic Relations Case*, 20 FAM. L.Q. 3 (1986). See also 29 U.S.C. § 1001 (1988).

70. 571 N.E.2d 298 (Ind. Ct. App. 1991).

71. *Id.* at 301 (citing *Kirkman v. Kirkman*, 555 N.E.2d 1293 (Ind. 1990)).

72. *Id.*

marriage—except as it relates to the disposition or dissipation of property—is irrelevant to the trial court’s division of marital assets. Ind. Code § 31-1-11.5-11(c). Our task in the present case, as we perceive it, is to determine—after removing fault from the analysis—whether the trial court’s finding that the statutory presumption that an equal distribution of marital property is just and reasonable has been rebutted can be sustained.⁷³

Judge Robertson’s methodology employed a process of elimination to show that the wife’s contention (and the trial court’s finding) that the risk that the wife might develop AIDS impacted her economic circumstances was implicitly based upon fault and not fact. Judge Robertson held that the evidence taken in its entirety “regarding the risk that the wife could develop AIDS is entirely conjecture or speculation and is insufficient to support the wife’s claim.”⁷⁴ The evidence was undisputed that the last sexual contact between the husband and wife occurred sometime in 1987. The husband also testified that he had been tested for HIV on several occasions and had tested negative.⁷⁵

After determining that the “health and economic circumstances” justification for the unequal distribution was based on fault, the court addressed whether the finding that the husband was underemployed by choice supported an unequal division of assets. The husband asserted that his underemployment was not voluntary, but was the result of limited employment opportunities available to a middle-aged executive in the late 1980s. He presented voluminous evidence of efforts to obtain employment comparable to his past relevant work.⁷⁶ Although the uncontroverted evidence indicated that the husband did travel for a couple of months, he did so without any objection from his wife.⁷⁷ During this period of time, the marital debt increased as the result of his travels and the disruption of his employment.⁷⁸ The court concluded that “even if all the parties’ ‘credit card’ type debt were to be charged to the husband as dissipation of marital resources, the amount of such dissipation would not approach the magnitude of the trial court’s deviation from an equal division of marital property.”⁷⁹ Considering the totality of the circumstances, including the husband’s thirty year career and accumulation of the greatest part of the marital assets, the court con-

73. *Id.*

74. *Id.* at 303.

75. *Id.* at 302.

76. *Id.* at 304.

77. *Id.*

78. *Id.* at 305.

79. *Id.*

cluded that "the trial court's deviation from equality greatly in excess of any such dissipation is punitive in nature and constitutes an abuse of discretion."⁸⁰

The husband also appealed the award of fees to his wife. The trial court found that a substantial portion of her fees and costs related to valuation issues, the husband's refusal to acknowledge his pension as an asset, and issues relating to the circumstances under which the marriage terminated. The court of appeals held that the trial court erred in basing its award of nearly all of the wife's attorney's fees in part on a finding that the husband's sexual preference contributed to the failure of the marriage.⁸¹ The cause was reversed and remanded with instructions to enter a new award of fees without regard to issues relating to the failure of the marriage and without considering fault.⁸² The court noted, however, that misconduct directly resulting in additional litigation expenses may properly be taken into account in the trial court's decision to award attorney's fees in dissolution proceedings.⁸³ This appears to be the only sense in which fault is a proper consideration when awarding attorney's fees.

In *Norton v. Norton*,⁸⁴ previously remanded for explanation because of an unequal property distribution, the court remanded for a second time because the trial court's findings that the parties' debt was a "mess of the husband's making" and that the wife had to "put up" with him for nearly thirty years, smacked of fault greatly at odds with any dissipation by the husband.⁸⁵

E. Fraud and the Affirmative Duty to Disclose

The duty of a divorcing spouse represented by counsel to disclose assets and values to an unrepresented party is instructive and could give divorce attorneys cause to consider how to handle a *pro se* opponent. In *Selke v. Selke*,⁸⁶ the wife was not represented by an attorney and later indicated that she believed her husband's attorney represented both parties. According to their settlement agreement, the husband received

80. *Id.*

81. *Id.* at 306.

82. *Id.*

83. *Id.* See also *Jenkins v. Jenkins*, 567 N.E.2d 136 (Ind. Ct. App. 1991) (fault in the nature of misconduct that directly results in additional litigation expenses may properly be taken into account, but the mere lack of success in bringing a petition before the court is not sufficient to support an award of attorney's fees in favor of a prevailing party without additional evidence about the parties' relative financial circumstances).

84. 573 N.E.2d 941 (Ind. Ct. App. 1991).

85. *Id.* at 944-45.

86. 569 N.E.2d 724 (Ind. Ct. App. 1991).

all of his pension rights. The wife did not appear at the final hearing and their agreement was approved.⁸⁷ Several months later, the wife unsuccessfully filed a petition to set aside the agreement on the basis of fraud.⁸⁸ At the hearing on the wife's motion, testimony revealed that the plan was worth in excess of \$60,000, that the wife never asked the husband about the plan's value, and that the husband never provided that information to the wife. On appeal, Judge Chezem, speaking for the Fourth District, agreed with the wife that each party "had a duty 'to fully disclose the assets of the marriage' and [the husband's] failure to do so amounts to 'constructive fraud.'"⁸⁹ Judge Chezem stated:

We first note that property settlement agreements in dissolution of marriage cases are encouraged in Indiana. "The public policy of this state favors the amicable settlement by written agreement of the property rights of those citizens who are having their marriages dissolved." In addition, there should be "full disclosure" by the parties when they negotiate and execute property settlement agreements. The parties should disclose the information they have with respect to their property and its value, especially where one party is not represented by counsel. Otherwise, the agreement may be set aside for fraud. As noted in *Stockton v. Stockton* a property settlement agreement may be set aside where the record demonstrates "some unfairness, unreasonableness, manifest inequity in the terms of the agreement, or that the execution of the agreement was procured through fraud, misrepresentation, coercion, duress or lack of full disclosure."⁹⁰

Mrs. Selke knew of the existence of the pension plan before signing the settlement agreement, but never concerned herself with its value, perhaps out of ignorance that her husband's pension was marital property and subject to division. If she had been represented by counsel, would the husband and his counsel have had an affirmative duty to bring the pension's value to the attention of their opponents? The prior decision in *Atkins* indicates that the answer depends upon the nature of the asset, the accessibility of information about its value, and the parties' covenants regarding disclosure of financial information.⁹¹

87. *Id.* at 725-26.

88. *Id.*

89. *Id.* at 726.

90. *Id.* (citations omitted).

91. *Atkins v. Atkins*, 534 N.E.2d 760 (Ind. Ct. App. 1989).

F. Enforcement of Divorce Obligations

The United States Supreme Court in *Farrey v. Sanderfoot*⁹² reversed the Seventh Circuit Court of Appeals ruling affirming the avoidance of a divorce decree-created lien on the marital residence awarded to the husband.⁹³ In that case, the parties were divorced after twenty years of marriage. Gerald Sanderfoot was awarded the vast majority of the assets and was ordered to pay Jeanne Farrey approximately \$29,000. To secure the debt, Farrey was granted a lien against the marital residence until the debt was paid. Sanderfoot failed to make any payment to his ex-wife. Instead, he filed a Chapter Seven bankruptcy petition and listed his residence as exempt homestead property. He filed a motion to avoid his ex-wife's lien under section 522(f)(1) of the Bankruptcy Code. Although his motion was denied by the Bankruptcy Court, the district court reversed and was upheld by a divided Seventh Circuit. The Supreme Court granted certiorari to settle a conflict among the courts of appeal.

Justice White, writing for the Court, reasoned that a debtor cannot avoid the fixing of a lien to his property under Bankruptcy Code section 522(f)(1) unless the debtor had his property interest before the lien attached.⁹⁴ Because both parties agreed that, under Wisconsin law, the divorce decree terminated their prior property interests and created new interests, the award of the marital residence to the husband was akin to purchasing a new residence from a third party with an existing lien.⁹⁵ Alternatively, Justice White reasoned that had the decree not extinguished the parties' pre-existing interests, the lien would not have encumbered Sanderfoot's interest, but would have transferred the wife's interest to him with a simultaneously created encumbrance.⁹⁶ Under either theory, the lien would not be avoidable under section 522(f)(1) of the Bankruptcy Code.⁹⁷

As pointed out in the concurring opinion of Justices Kennedy and Souter, the case turned on the fact that a divorce decree in Wisconsin terminates pre-divorce property rights and creates new ones.⁹⁸ Thus, depending upon the interpretation of state law or the specific wording of a property settlement agreement or divorce decree, a divorce debtor may be able to avoid a judicially created lien in favor of the former spouse. This will occur if the agreement is interpreted to effect the

92. 111 S. Ct. 1825 (1991).

93. *Id.* at 1831.

94. *Id.*

95. *Id.* at 1830-31.

96. *Id.*

97. *Id.* at 1831.

98. *Id.* at 1832 (Kennedy, J., concurring).

encumbrance of an existing right instead of terminating those rights and creating new rights with a simultaneously created lien.⁹⁹

II. SPOUSAL MAINTENANCE

Parties seeking spousal maintenance did not fare well during this survey period. There was only one published decision in which maintenance was ordered, and it was reversed on appeal. In *Grammer v. Grammer*¹⁰⁰ the court of appeals cautioned the trial courts that there must be articulated reasons supported by the evidence to uphold an award.¹⁰¹ The trial court did not find Mrs. Grammer to be physically or mentally incapacitated, and the evidence did not establish that her education or employment was interrupted during the marriage. As a result, the court's order that the husband pay his wife twenty-five dollars per week as maintenance and any school expenses and to maintain her medical insurance was reversed for failure to satisfy any of the subsections of Indiana's maintenance statute.¹⁰²

In *Dahnke v. Dahnke*¹⁰³ the trial court's continued denial of rehabilitative maintenance to the wife was reversed and remanded a second time.¹⁰⁴ The court of appeals again focused upon required statutory findings, this time holding that the trial court's failure to consider the fourth statutory factor, the time and expense necessary to acquire sufficient education or training to enable the wife to find appropriate employment, was an abuse of discretion. The trial court wholly failed to mention or discuss the evidence presented, despite an abundance of relevant testimony.¹⁰⁵

Even when a spouse is disabled, the trial courts retain discretionary authority to grant or deny maintenance. In *Axom v. Axom*,¹⁰⁶ the court

99. *Id.* at 1831-32.

100. 566 N.E.2d 1080 (Ind. Ct. App. 1991).

101. *Id.* at 1082-83.

102. *Id.* at 1083. See IND. CODE § 31-1-11.5-11(e)(1)-(3) (1988).

103. 571 N.E.2d 1278 (Ind. Ct. App. 1991). The trial court was previously instructed, upon remand, to enter findings consistent with the appellate determination that the wife's education was interrupted and to reconsider awarding her rehabilitative maintenance in light of its new findings and the provisions of Indiana Code § 31-1-11.5-11.

104. *Id.* at 1282.

105. *Id.* at 1281. During their marriage, Mrs. Dahnke became pregnant by her husband and had to drop out of high school. She had sufficient credits, however, and did graduate. She wanted to attend college but this was precluded by her pregnancy. The few jobs she had during the parties' 14 year marriage all involved low income employment. After the parties separated, she successfully completed the Scholastic Aptitude Test and then completed several courses at Purdue University. *Id.* at 1279-80.

106. 565 N.E.2d 1097 (Ind. Ct. App. 1991) (reversed and remanded in part on unrelated issue).

of appeals held that the trial court did not abuse its discretion in failing to award spousal maintenance even though Mrs. Axom was sixty-one years old, disabled, and receiving social security disability insurance benefits.¹⁰⁷ The court believed that Mr. Axom's ability to support himself was marginal and that she had additional resources available to provide for her support as a result of the property settlement.¹⁰⁸

There is a distinction between parties' freedom to contract regarding their own rights and obligations and those of their children, whose welfare the courts are duty bound to protect under the doctrine of *parens patriae*. In *Bowman v. Bowman*,¹⁰⁹ a husband's action to modify maintenance was dismissed and affirmed on appeal.¹¹⁰ Pointing out the distinction between maintenance by agreement and maintenance ordered pursuant to statute, the court of appeals held that the parties' settlement agreement, prohibiting modification of spousal support, was merged and incorporated into the final decree, was enforceable, and did not violate Indiana's statute permitting modification of maintenance orders.¹¹¹

The court distinguished this case from *Meehan v. Meehan*¹¹² in which a child support obligation was found subject to modification, pursuant to Indiana Code section 31-1-11.5-17(a), despite a provision in the parties' agreement stating it could not be modified. The *Meehan* decision speaks only to modification of child support orders. Public policy supporting modification of child support is different from the public policy regarding settlement agreements. The court of appeals held that the modification statute applies only to awards of spousal maintenance premised upon a court's finding of incapacity.¹¹³

III. CHILDREN

A. Custody

1. *Are Post-Dissolution and Post-Paternity Custody Modifications Different?*—Unknown to many family law practitioners is the fact that dissolution and paternity matters are governed by statutes establishing

107. *Id.*

108. *Id.* at 1098. See also *In re Marriage of Snemis*, 575 N.E.2d 650 (Ind. Ct. App. 1991).

109. 567 N.E.2d 828 (Ind. Ct. App. 1991).

110. *Id.* at 831.

111. *Id.* The husband claimed a change in circumstances in that the wife had recovered from her disability and was now capable of supporting herself.

112. 425 N.E.2d 157 (Ind. 1981).

113. *Bowman*, 567 N.E.2d at 830.

different standards for modification of custody.¹¹⁴ This difference was first noted with some consternation in 1984 by the Third District Court of Appeals in *Griffith v. Webb*¹¹⁵ in which the court recommended that the legislature examine the apparent discrepancy for constitutional infirmities.¹¹⁶ The issue has arisen again, resulting in conflicts between the Third District's decision in *Griffith*, the Fourth District's decision in *Walker v. Chatfield*,¹¹⁷ and the First District's decision in *In re Grissom*.¹¹⁸

In *Grissom*, paternity of the parties' daughter was established in 1988. By agreement, custody was awarded to the mother, and the father was granted visitation privileges. The father later filed a petition seeking custody of his daughter, alleging that the mother had removed his daughter from Indiana without notifying him or the court and that his visitation rights had been violated. The father was granted temporary custody.

After the hearing, the trial court found that prior to the father's petition, the mother changed residences three times and visited her daughter only a few times during the ten month period in which the father had temporary custody. The trial court specifically concluded that it was in the best interests of the child that she be placed in the custody of her father and awarded the mother visitation privileges. The mother appealed, and the father did not supply the court of appeals with a brief, thereby permitting a reversal upon a mere showing of *prima facie* error in the trial court's judgment.¹¹⁹ The court noted that, in its discretion, it could decide the case on its merits and chose to do so.¹²⁰

The mother argued that the trial court's use of the "best interest" standard provided by Indiana Code section 31-6-6.1-11(e) is the wrong standard to use for custody modifications. She contended that the court should have used the standard employed in post-dissolution custody

114. Indiana Code § 31-1-11.5-22(d) (1988) sets forth the standard for modification of a custody order made pursuant to the dissolution of marriage act:

The court in determining said child custody, shall make a modification thereof only upon a showing of changed circumstances so substantial and continuing as to make the existing custody order unreasonable. In making its determination, the court shall not hear evidence on matters occurring prior to the last custody proceeding between the parties unless such matters relate to a change of circumstances.

Indiana Code § 31-6-6.1-11(e) (1988), pertaining to the modification of custody orders entered in a paternity action, states "the court may modify an order determining custody rights whenever modification would serve the best interests of the child."

115. 464 N.E.2d 384 (Ind. Ct. App. 1984).

116. *Id.* at 385.

117. 553 N.E.2d 490 (Ind. Ct. App. 1990).

118. 573 N.E.2d 440 (Ind. Ct. App. 1991).

119. *Id.* at 442.

120. *Id.*

modifications—changed circumstances rendering the existing custody order unreasonable.¹²¹

Chief Judge Ratliff, speaking for the First District, noted the *Griffith* court's suggestion that the legislature examine the discrepancy between the standards for post-paternity and post-dissolution custody modifications and that the legislature had not changed the provision. Siding with the analysis of the Fourth District in *Walker v. Chatfield*, the court stated:

We agree with the *Walker* court that it is in the child's best interest to require a substantial and continuing change in circumstances before modifying a custody order. Therefore, we hold that in a custody modification proceeding arising out of a paternity action, the petitioning party must demonstrate a substantial and continuing change in circumstances so as to make the existing custody order unreasonable. If we were to hold otherwise, serious constitutional problems may arise.¹²²

After reviewing the record, Chief Judge Ratliff held that the trial court did not articulate, and the court did not find, evidence of substantial and continuing circumstances making the original custody order unreasonable.¹²³

Judge Staton issued a vigorous dissent. First, he flatly declared *Walker v. Chatfield* to be incorrect.¹²⁴ He then stated that the majority's reliance upon *Walker* was wrong because it refused to follow the *Griffith* decision in which the court held that it is the task of the Indiana Legislature to change the statutes.¹²⁵ The conflict among the district courts of appeal appears ripe for resolution by the Indiana Supreme Court.

2. *Is The Law of Third Party and Natural Parent Custody Disputes Changing?*—A previous survey of recent developments in family law¹²⁶ noted the departure brought about by *Turpen v. Turpen*¹²⁷ from the rigorous three-part test established in *Hendrickson v. Binkley*¹²⁸ for third

121. *Id.*

122. *Id.* at 443.

123. *Id.*

124. *Id.* at 444 (Staton, J., dissenting).

125. *Id.*

126. Michael G. Ruppert, *Survey of Recent Developments in Family Law*, 23 IND. L. REV. 363 (1990).

127. 537 N.E.2d 537 (Ind. Ct. App. 1989).

128. 316 N.E.2d 376 (Ind. Ct. App. 1974), *cert. denied*, 423 U.S. 868 (1975). The *Hendrickson* court stated the three-step process as follows:

First, it is presumed that it will be in the best interests of the child to be placed

party, natural parent custody disputes.¹²⁹ It appears that the departure from a mechanical approach in evaluating the evidence in third party natural parent custody disputes continues.

In *Hunt v. Whalen*,¹³⁰ Mr. and Mrs. Whalen, the paternal grandparents of David Whalen, successfully petitioned for custody of the child with whom they had been awarded visitation rights in the parents' divorce proceeding. They regularly exercised visitation prior to their custody petition and on several occasions took the child to a doctor who expressed concerns about several health and developmental problems experienced by David. At the hearing on the paternal grandparents' petition for custody, the mother, Claudette Hunt, did not appear. The grandparents were awarded custody, and the mother was given limited visitation privileges. The mother appealed from the denial of her motion to set aside the default judgment, asserting that the trial court's decision was contrary to law because the grandparents failed to show she was unfit, had acquiesced in their custody of David, or had voluntarily relinquished custody of the child as required by *Hendrickson*. In response, the grandparents argued that they had offered sufficient proof of the mother's unfitness and, relying on *Turpen*, urged the court to reject "a mechanical approach to custody disputes involving parents and non-parents."¹³¹

The potential erosion of the *Hendrickson* standard caused by *Turpen* may be accelerated by the decision in *Hunt* and, in particular, its interpretation of *Walker*.¹³² Speaking for the Third District in *Hunt*,

in the custody of the natural parent. Secondly, to rebut this presumption it must be shown by the attacking party that there is (a) unfitness, (b) long acquiescence, or (c) voluntary relinquishment such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child. The third step is that upon a showing of one of these above three factors, then it will be in the best interests of the child to be placed with the third party.

Id. at 380. *Hendrickson* also established that the presumption must be rebutted by "clear and cogent evidence." *Id.* at 381.

129. Ruppert, *supra* note 126, at 377.

130. 565 N.E.2d 1109 (Ind. Ct. App. 1991).

131. *Id.* at 1111.

132. In *Walker*, the mother appealed the trial court's order granting the father's petition for modification of the original custody order. According to the evidence, however, actual physical custody of Gloria Walker's daughter would be with the father's mother. On appeal, Mrs. Walker argued two theories for reversal of the juvenile court's order modifying custody. The first was that the father was required to show a substantial and continuing change of circumstances justifying modification of custody in order to obtain custody, not simply that modification was in the child's best interest. The court of appeals agreed. *Id.* at 492, 496. Alternately, Gloria Walker argued that awarding legal custody to the father was, in effect, tantamount to awarding custody to his mother, a third party.

Judge Staton noted, "Judge Robertson [in *Turpen*] defined the appropriate inquiry as whether there existed evidence supporting the trial court's determination that the presumption favoring the natural parent had been sufficiently rebutted."¹³³ However, his discussion of *Walker v. Chatfield* for the proposition that it clarified the standard of proof supporting a transfer of custody from a parent to a third party is troublesome:

Subsequently, in *Walker v. Chatfield*, this court considered the standard of proof which will support a transfer of custody from a parent to a third party. Custody was not appropriately removed from the custodial (and natural) parent absent a showing of (1) abandonment; (2) unfitness of the natural parent; (3) substantial change in custodial parent's home which was detrimental to the child's welfare; or, (4) unreasonableness of the original custody order.¹³⁴

This analysis of *Walker v. Chatfield* is suspect and unnecessary to the decision in *Hunt*. In fact, the trial court in *Hunt* appeared to have ample evidence of the mother's unfitness; it specifically found that "clear and convincing evidence . . . [overcame] the legal presumption in favor of the natural mother,"¹³⁵ as required by *Hendrickson*. The *Hunt* court's discussion has the potential for eroding further the *Hendrickson* standard for natural parent, third party custody disputes because it implies that elements 3 and 4 in *Walker* may justify removing custody from the natural parent and placing the child with a third party.

Failure to show factors 1 or 2 — the child was abandoned or the custodian was unfit — would apply to a natural parent, third party custody dispute. Factors 3 or 4 would apply to a child custody modification proceeding in which the party seeking custody is required to show a substantial and continuing change of circumstances. The *Hunt* court, by lumping together all four potential situations as supporting a transfer of custody from a natural parent to a third party, has arguably given future litigants the opportunity to argue that a substantial change

The *Walker* court, giving great deference to *Hendrickson v. Binkley*, stated:

In summary, the evidence does not support a change of custody from Mother to Father—and, certainly does not support a transfer which is, in effect, to a third party. Father did not show: (1) the child was abandoned; (2) the Mother was unfit; (3) a substantial change in Mother's home occurred which was detrimental to the child's welfare; or, (4) the original custody order was unreasonable.

Id. at 503.

133. *Hunt v. Whalen*, 565 N.E.2d 1109, 1111 (Ind. Ct. App. 1991).

134. *Id.* (citations omitted).

135. *Id.*

in the custodial parent's home, which is detrimental to the child's welfare, but which does not rise to clear and convincing proof of unfitness, can form the basis for a transfer of custody.

3. *What Is An Inconvenient Forum For The Litigation of Custody?*— During the survey period one notable case involving the Uniform Child Custody Jurisdiction Act (UCCJA)¹³⁶ was decided. *Horlander v. Horlander*¹³⁷ does not present a particularly difficult question of conflicting jurisdiction over a child custody proceeding. The case is interesting, however, for its holdings that the UCCJA applies to proceedings in a foreign nation,¹³⁸ that the "significant connections" test for jurisdiction is not an alternative to the "home state" test when the latter is still applicable,¹³⁹ and that even if the foreign nation exercises jurisdiction over the custody matter in substantial conformity with state law, the trial court's finding in *Horlander* that the foreign nation would provide the more convenient forum was an abuse of discretion.¹⁴⁰

In *Horlander*, the trial court's finding that France was the more convenient forum was the key issue. Even if France had not exercised child custody jurisdiction in substantial conformity with the UCCJA, the court recognized that commentary applicable to Indiana Code section 31-1-11.6-6(a) and the policy against simultaneous custody proceedings would allow the trial court to decline jurisdiction if Indiana was an inconvenient forum under Indiana Code section 31-1-11.6-7.¹⁴¹ Reciting the factors to be considered in determination of inconvenient forum,¹⁴² the court held that the trial court abused its discretion in dismissing the custody dispute on the basis of inconvenient forum in light of the evidence that the children were born in Indiana, lived in Indiana all their lives until they were removed several months prior to the filing of the father's petition in Indiana seeking custody, the father's family and the parties' friends lived in Indiana, relevant evidence pertaining to the wife's medical condition was in Indiana, and many witnesses who could testify as to both parents' fitness to raise the children were in Indiana.¹⁴³

C. Child Support

There were twenty or more published child support decisions during the survey period. Several of the most significant are discussed below.

136. IND. CODE §§ 31-1-11.6-1 to -25 (1988).

137. 579 N.E.2d 91 (Ind. Ct. App. 1991).

138. *Id.* at 94.

139. *Id.* at 97.

140. *Id.* at 99.

141. *Id.* at 97-98.

142. *Id.* at 98.

143. *Id.*

Whether or not the trial court order provided sufficient articulation to support a deviation from the Indiana Child Support Guidelines was among several issues decided in *Talarico v. Smithson*.¹⁴⁴ A former wife's action for modification of child support resulted in an order compelling her former husband to pay \$145 per month in addition to veteran's and social security benefits she already received on behalf of the children.¹⁴⁵ The wife appealed and the Third District Court of Appeals held that the availability of the noncustodial parent's veteran's benefits and social security benefits did not justify a deviation from the Child Support Guidelines.¹⁴⁶ The appellate court's conclusion turned on the fact that even if the amount received on behalf of the children for the veteran's and social security benefits was added to the ordered child support payment, the resulting lump sum received on behalf of the children would still be below the suggested guideline amount.¹⁴⁷

The court of appeals decision in *In re Paternity of Buehler*¹⁴⁸ provides guidance in determining when underemployment and potential income are to be considered in calculating child support. The court of appeals reversed the trial court's order to pay child support in an amount disproportionate to the father's present income based on its determination that he was underemployed.¹⁴⁹ The husband was valedictorian of his high school class and had obtained two Bachelor of Arts degrees in physics and chemistry. He operated a photo studio. The court of appeals noted that after receiving his college degrees, the father had unsuccessfully sought employment, and there was no evidence that he had rejected any employment offers or that there were any employment opportunities for which he was especially qualified.¹⁵⁰ In deciding the issue, the court of appeals noted:

The commentary to Support Guideline 3 discloses two purposes in the provisions calling for the determination of potential income. One is to discourage a parent from taking a lower paying job to avoid the payment of significant support. The other is to fairly allocate the support obligation when one parent remarries and, because of the income of the new spouse, chooses not to be employed. No mention is made of using child support as a tool to promote a society where all work to their full economic

144. 579 N.E.2d 671 (Ind. Ct. App. 1991).

145. *Id.* at 672.

146. *Id.* at 673.

147. *Id.*

148. 576 N.E.2d 1354 (Ind. Ct. App. 1991).

149. *Id.* at 1356.

150. *Id.*

potential, or make their career decisions based strictly upon the size of potential paychecks.¹⁵¹

Because the father was engaged in the same occupation and earned relatively the same amount of income during the parties' relationship, which endured for about ten years and resulted in the birth of the child, the court of appeals held that there was no basis for determining that he was underemployed when calculating his support obligation.¹⁵²

In *Davis v. Vance*,¹⁵³ the appellate court affirmed the trial court's determination that a father's child support obligation should not be abated during his incarceration because a parent's support obligation cannot be abated before it accrues.¹⁵⁴ It is unclear what the court meant because the father's request was in the nature of a petition to modify child support and was filed prior to his period of incarceration. This case represents an extension of the prior decision in *Cardwell v. Gwaltner*,¹⁵⁵ in which the court held that a support obligation cannot be retroactively excused for a period of incarceration.¹⁵⁶ In *Davis*, the court emphasized that the duty of support is ongoing and that one must take responsibility for one's crimes and all repercussions: "It would be contrary to the Indiana Child Support Guidelines and to the very nature of our public policy favoring a child's security and maintenance to allow payments to abate based on a willful, unlawful act of the obligor."¹⁵⁷ In light of this language, the court appears to be holding that an anticipated period of unemployment resulting from incarceration will not justify a modification of child support.

The decision in *Matson v. Matson*¹⁵⁸ points out an important exception to the rule that overpayments of child support are not creditable and are deemed voluntary gifts. A trial court denied a father's petition for credit resulting from a tax intercept and was reversed on appeal. The Fifth District Court of Appeals held that an overpayment resulting from an inappropriate application of a tax interception is not a voluntary overpayment of child support or a gratuity.¹⁵⁹ The rationale for this deviation from the general rule is found in the federal statute authorizing a tax intercept, which specifically provides that excess amounts withheld shall be paid to the obligor.¹⁶⁰

151. *Id.* at 1355-56.

152. *Id.* at 1356.

153. 574 N.E.2d 330 (Ind. Ct. App. 1991).

154. *Id.* at 331.

155. 556 N.E.2d 953 (Ind. Ct. App. 1990).

156. *Id.* at 954.

157. *Davis*, 574 N.E.2d at 331.

158. 569 N.E.2d 732 (Ind. Ct. App. 1991).

159. *Id.* at 734.

160. 42 U.S.C. § 664(a)(3)(D) (1988).

The Indiana Supreme Court carved a narrow exception to the prohibition against retroactive modification of child support in *Kaplon v. Harris*.¹⁶¹ A former husband petitioned to modify child support after emancipation of two of his children and the death of another. Chief Justice Shepard provided the following rationale:

Without an exception to the no-credit rule, a non-custodial parent would be forced to file a petition to modify before making arrangements for a child's funeral if the parent wished to preserve the possibility of gaining financial participation by the other parent. Courts should not impose such a grisly requirement upon a parent who is facing the tragedy of a child's death. Consequently, we hold that a trial court may properly entertain a request concerning funeral expenses retroactively through a petition to modify or through a claim for credit.¹⁶²

At the same time, the court found that the trial court's allowance of a one-third credit on the support obligation after the death of the child was an improper retroactive modification and remanded the case for a new calculation of the support which had accumulated prior to the filing of the petition to modify.¹⁶³

Finally, the most publicized recent support decision is *Neudecker v. Neudecker*¹⁶⁴ in which a father unsuccessfully appealed an order increasing his child support obligation and requiring payment of reasonable college expenses. The Second District Court of Appeals affirmed the trial court's determination and the Indiana Supreme Court granted transfer to address the father's claim that the dissolution statute authorizing trial courts to order parents to pay sums for their children's educational expenses is unconstitutional. His argument was premised on the fact that although the dissolution statute authorizes a court to order payment of all children's college costs, married parents are not legally required to provide a college education for their offspring. In rejecting his equal protection argument, the supreme court approved the court of appeals finding of a rational relationship between the child support statutory scheme and the state interest in seeing that children of divorced parents are afforded the same opportunities as children of married parents.¹⁶⁵

The court also pointed out that the right to make educational decisions necessarily follows custody and that it is not a violation of a noncustodial parent's liberty rights to order him to bear the reasonable

161. 567 N.E.2d 1130 (Ind. 1991).

162. *Id.* at 1133.

163. *Id.* at 1132, 1133.

164. 577 N.E.2d 960 (Ind. 1991).

165. *Id.* at 962.

cost, or portion thereof, for that education.¹⁶⁶ Based on the court's rationale, it is likely the result would have been the same even if the parties had joint custody.

IV. MISCELLANEOUS

*Topel v. Miles*¹⁶⁷ is a must read decision issuing a strong edict to adoption practitioners. A consent to adoption by either natural parent cannot include any right to ongoing contact. In *Topel*, a visitation agreement in favor of a natural father executed with his Consent to Adoption was held to be a consent-vitiating factor that rendered his consent invalid.¹⁶⁸ Despite the agreement, the visitation arrangement soon faltered, and the natural father was offered the return of his child upon payment of approximately \$3,000 (estimated to be the expenses incurred in caring for the child). He was advised that the adoption would proceed and that he would no longer be allowed visitation.

The court of appeals believed it impossible for a father to validly consent to the termination of all parental rights and at the same time retain the right to exercise visitation privileges. The court held, *as a matter of law*, that "consent" does not exist under these circumstances.¹⁶⁹ The appellate court, citing a previous decision, declared that a Decree of Adoption severs forever every part of the parent-child relationship and engrafts the child upon a new family tree.¹⁷⁰ For all legal and practical purposes, an adopted child is the same as dead to his parents, and they lose the right to ever see the child again.¹⁷¹ The appellate court held that the issue of an invalid consent may be raised by the intervention of the natural parents or by a petition to withdraw consent and that the burden of proof is on the natural parent.¹⁷² The court of appeals reversed the judgment and remanded for proceedings consistent with its decision.¹⁷³

166. *Id.*

167. 571 N.E.2d 1295 (Ind. Ct. App. 1991).

168. *Id.* at 1299. The adoptive parents were the brother and sister-in-law of the natural mother. By its terms, the "visitation agreement" was intended to guarantee ongoing visitation by the natural father every other weekend, was not limited to the period of time prior to a final adoption decree, and did not indicate that the visitation would be subject to termination in the future. Although the natural mother did not sign a "Visitation Agreement," it is likely the adoptive parents orally promised that she would have ongoing contact with her child in light of the relationship of the parties.

169. *Id.*

170. *Id.* at 1298 (citing *Bryant v. Kurtz*, 189 N.E.2d 593 (Ind. Ct. App. 1963)).

171. *Id.*

172. *Id.*

173. *Id.* at 1299. In a footnote, the appellate court indicated that because the consent of both parents is essential in an adoption, it was unnecessary to analyze the validity of the natural mother's claim that her consent was also invalid. *Id.* at 1299 n.3.

V. RECENT LEGISLATION

Recent legislation focused on children. Statutes were added and amended regarding support, protection, paternity, services, and education. Several are briefly discussed below.

House Enrolled Act 1631 amends various statutes relating to child support. Subsection (g) was added to section 31-1-11.5-12 of the Dissolution Act and provides that the obligation to pay support arrearages does not terminate when the duty to support ceases.¹⁷⁴ The Uniform Reciprocal Enforcement of Support Act (URESA)¹⁷⁵ was amended to authorize the trial courts to make a determination of paternity, when necessary, to establish a duty of support.¹⁷⁶ This act also establishes jurisdiction to make original paternity determinations. As a result, the circuit court now has concurrent original jurisdiction with the Juvenile Court and Probate Court, enabling all three to establish paternity under URESA to facilitate enforcement of a support duty.

Indiana Code section 31-2-10-4 was amended to broaden the definitions of income and income payor.¹⁷⁷ Indiana Code section 31-2-10-8 was amended to include URESA actions when the court makes an original determination of paternity and when income withholding applies.¹⁷⁸ It further narrows the basis for contesting activation of an Income Withholding Order solely to a "mistake of fact." The prior basis of "good cause" has been eliminated.¹⁷⁹ Indiana Code section 31-2-10-18 has been broadened to permit termination of an Income Withholding Order only when *both* the duty to support ceases and no child support arrearage exists. Subsection 19 was added to provide for activation of an Income Withholding Order if support is delinquent, the Income Withholding Order cannot be activated under other sections, and the duty to support has ceased.¹⁸⁰

House Enrolled Act 1501 amended Indiana Code 33-2.1-1 by adding Chapter 10 which creates an Indiana Child Support Advisory Committee.¹⁸¹ A bipartisan, gender balanced committee including two judges whose case loads include domestic relations, two professionals in an economic or other relevant field, two attorneys who conduct at least fifty percent of their practice in domestic relations, four members of the general assembly, one custodial parent, and one noncustodial parent

174. IND. CODE § 31-1-11.5-12(g) (Supp. 1991).

175. IND. CODE § 31-2-1-1 to -39 (1988 & Supp. 1991).

176. IND. CODE §§ 31-2-1-1(1), 31-2-1-19(b), 31-1-2-19.5 (1988 & Supp. 1991).

177. P.L. 201-1991 (to be codified at IND. CODE § 31-2-10-4).

178. *Id.* (to be codified at IND. CODE § 31-2-10-8).

179. IND. CODE § 31-2-10-13(b) (1988).

180. IND. CODE § 31-2-10-19 (Supp. 1991).

181. IND. CODE § 33-2.1-10-1 to -9 (Supp. 1991).

was established. Members are appointed for staggered two year terms beginning August 1, 1991. The purpose of the committee is to review the Child Support Guidelines and make appropriate recommendations regarding amendments. The committee must submit an annual report to the supreme court and the legislature by August 1. The supreme court may then amend the guidelines based upon the recommendations provided.¹⁸²

After extensive hearings by the Family Law Study Committee, the Uniform Marital Property Act, House Bill 1499 and Senate Bill 406, was again introduced and finally passed out of the House Judiciary Committee. However, it was defeated on the floor of the House.

VI. CONCLUSION

During this survey period, Indiana courts focused upon dispelling fault, in the nature of misconduct during the marriage, as a valid basis for awarding a disproportionate share of property or attorney's fees in a dissolution of marriage proceeding. The courts placed equal emphasis upon the necessity of trial courts to supply more adequate findings when deviating from 50/50 property divisions, the presumptive guideline child support amounts, and when granting or denying awards of maintenance. There was also some clarification of the different standards applicable when seeking modifications of custody in post-divorce and post-paternity actions. Legislative changes in the family law area addressed the support, protection, paternity, services for, and education of, our children. We can anticipate the continuing development and clarification of property distribution, spousal maintenance, and child support awards, as well as future revisions to the Child Support Guidelines.

182. *Id.*

Indiana Lawmakers Face National Health Policy Issues

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INTRODUCTION

Indiana, like other states, is struggling with the difficult health policy issues of how to assure access to affordable and high quality health care. Last year, Indiana lawmakers addressed aspects of the health policy issues in litigation and, to a lesser degree, in legislation concerning the termination of medical treatment, health care for the indigent, Medicaid reimbursement for nursing facilities, discrimination against AIDS victims by health insurers, and medical malpractice. It should be noted that in 1989, the Indiana legislature established the Indiana Commission on State Health Policy.¹ The Commission is currently analyzing problems of Indiana's health care system and developing strategies for reforms that the legislature could adopt to increase access to adequate, affordable, and high quality health care services for Indiana's residents.²

I. RIGHT TO DIE

A. *In re Lawrance*

In *In re Lawrance*,³ the Indiana Supreme court faced the broad issue of whether parents may authorize the removal of artificially provided nutrition and hydration from their never competent daughter, Sue Ann,

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1. Act of May 5, 1989, Pub. L. No. 327, 1989 Ind. Acts 2103.

2. IND. COMM'N ON STATE HEALTH POLICY, SECOND INTERIM REPORT TO THE GOVERNOR AND GEN. ASSEMBLY OF 1991 (Nov. 1991). See also *Health Policy Commission Sees No Easy Answers*, 85 IND. MEDICINE 12 (1992).

3. 579 N.E.2d 32 (Ind. 1991).

who was in a persistent vegetative state.⁴ The court considered three specific issues: (1) Whether the Health Care Consent Act (HCCA)⁵ applies when the family of a patient in a persistent vegetative state seeks to withdraw the patient's artificially provided nutrition and hydration; (2) if the HCCA does apply, whether court proceedings are required to effectuate the will of decisionmakers; and (3) whether the trial court erred in appointing a temporary limited guardian for Sue Ann Lawrance.⁶

Regarding the first issue, the supreme court concluded that the HCCA is applicable to decisions involving family members who seek to refuse artificial nutrition and hydration on behalf of an incompetent patient.⁷ The appellants argued that the provision in Indiana Code section 16-8-12-11 pertaining to the influence of the HCCA on Indiana law meant that the HCCA did not apply in this case. This section provides that nothing in the chapter including the HCCA will "affect Indiana law concerning an individual's authorization to make a health care decision for the individual or another individual, or to provide, withdraw, or withhold medical care necessary to prolong life."⁸ The supreme court concluded that the language pertaining to the "affect" indicated the legislature's intent that the HCCA be a procedural statute and stated:

The HCCA was hardly enacted in a legal vacuum. In recognition of existing law, the act is designed to establish procedures for health care decision making without altering the substantive rights of patients and their families. In this sense, the HCCA does not "affect" substantive Indiana law on withdrawal of treatment.⁹

The court went on to examine the relevant substantive law in Indiana on patient decisionmaking, noting at the onset that "the HCCA was written in a culture in which families typically make health care decisions when patients cannot."¹⁰ The court then reviewed the state constitution¹¹

4. Prior to the supreme court hearing of this case, Sue Ann Lawrance died of natural causes. Technically, the case was moot. However, Indiana courts have long recognized that a case may be decided on its merits under an exception to the general mootness rule when the case involves questions of "great public interest." *Id.* at 37 (quoting *Indiana Educ. Employment Relations Bd. v. Mill Creek Classroom Teachers Ass'n*, 456 N.E.2d 709, 711-12 (Ind. 1983)). The court decided that the Lawrance case fell within this exception. *Id.*

5. IND. CODE §§ 16-8-12-1 to -22 (1988 & Supp. 1991).

6. *Lawrance*, 579 N.E.2d at 37-38.

7. *Id.* at 41.

8. IND. CODE § 16-8-12-11(a) (1988).

9. *In re Lawrance*, 579 N.E.2d 32, 38 (Ind. 1991).

10. *Id.*

11. IND. CONST. art. I, § 1.

and Indiana's Living Will Act¹² and Power of Attorney Act¹³ and emphasized the consistent policy of patient autonomy reflected in the law.¹⁴ The supreme court concluded:

Respect for patient autonomy does not end when the patient becomes incompetent. In our society, health care decision making for patients typically transfers upon incompetence to the patient's family. . . . Even when they have not left formal advance directives or expressed particular opinions about life-sustaining medical treatment, most Americans want the decisions about their care, upon their incapacity, to be made for them by family and physician, rather than by strangers or by government. This preference is reflected in the HCCA's default provision, which says the patient's close family may make health care decisions when no other health care representative or guardian has been designated for the patient. This right to consent to the patient's course of treatment necessarily includes the right to refuse a course of treatment.¹⁵

The court then turned to the issue of whether one may decide to withdraw artificial nutrition and hydration. The court deferred to Indiana's medical community, the language of the HCCA, and decisions in other jurisdictions in deciding this issue.¹⁶ The supreme court concluded that the administration of "artificially" provided nutrition and hydration is a medical treatment which could be refused by Sue Ann's parents.¹⁷

The medical community's opinions on this issue are quite consistent. The Indiana State Medical Association, as *amicus curiae*, took the position that "artificially" provided nutrition and hydration is a medical treatment that may be withdrawn from a person in a persistent vegetative state.¹⁸ The court was persuaded by the precedents of numerous courts in which there was no distinction drawn between the withdrawal or withholding of artificial feeding or any other medical treatment.¹⁹

12. IND. CODE § 16-8-11-1 to -22 (1988).

13. IND. CODE § 30-5-5-16(b)(2) (Supp. 1991).

14. *In re Lawrance*, 579 N.E.2d 32, 38-39 (Ind. 1991).

15. *Id.* (citations omitted).

16. *Id.* at 40.

17. *Id.* at 39.

18. *Id.* at 40 (quoting Brief of Amicus Curiae Indiana Medical Ass'n at 9).

19. *Id.* See Amicus Curiae Brief In Support of Appellee at 33, *In re Lawrance*, 579 N.E.2d 32 (Ind. 1991) (No. 29S04-9106-CV-460) (authored by Kenneth M. Stroud, Professor of Law, Indiana University School of Law—Indianapolis). Cases cited in the Amicus Brief which support the *Lawrance* decision include *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841 (1990); *Mitchell ex rel. Rasmussen v. Fleming*, 741 P.2d 674

Further, the court found that the broad scope of the HCCA confirms this position.²⁰ Pointing out that the HCCA defines "health care" broadly as "any care, treatment, service, or procedure,"²¹ the court emphasized that the legislature did not limit the term "treatment" to medical treatment.²² The court then concluded, "Read through the lens of the medical community's view, even a limitation to 'medical treatment' would include nutrition and hydration decisions."²³

On the second issue, the court held that when family members are willing to act and agree with the physician to terminate medical treatment, a court proceeding is not required.²⁴ As the court stated, "The HCCA, written for a society in which health care decisions are routinely made by families on advice of physicians, is designed to resolve health care decisions without a need for court proceedings."²⁵ This view, according to the court, is consistent with decisions in other jurisdictions.²⁶ The court then found that the Lawrance family complied with the relevant provisions of the HCCA and therefore, a court proceeding was unnecessary in their case.²⁷

The court emphasized the availability of numerous safeguards to protect helpless patients from potential harms which could arise when a health care decision is made by a third party.²⁸ First, the court noted a strong commitment from organized medical professional groups such as the American Medical Association (AMA), whose committees issue ethical guidelines for the medical profession and keep up with rapid progress in medical technology.²⁹ Second, the court noted that health

(Ariz. 1987); *In re Morrison*, 253 Cal. Rptr. 530 (Cal. Ct. App. 1988); *In re Drabick*, 245 Cal. Rptr. 840 (Cal. Ct. App.), *cert. denied*, 488 U.S. 958 (1988); *Barber v. Superior Ct.*, 195 Cal. Rptr. 484 (Cal. Ct. App. 1983); *McConnell v. Beverly Enter.-Conn.*, 553 A.2d 596 (Conn. 1989); *Corbet v. D'Alessandro*, 487 So. 2d 368 (Fla. Dist. Ct. App. 1986); *In re Estate of Greenspan*, 558 N.E.2d 1194 (Ill. 1990); *In re Estate of Longeway*, 549 N.E.2d 292 (Ill. 1989); *In re Swan*, 569 A.2d 1202 (Me. 1990); *In re Gardner*, 534 A.2d 947 (Me. 1987); *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626 (Mass. 1986); *In re Peter*, 529 A.2d 419 (N.J. 1987); *In re Jobes*, 529 A.2d 434 (N.J. 1987); *Delio v. Westchester County Medical Ctr.*, 516 N.Y.S.2d 677 (N.Y. App. Div. 1987).

20. *In re Lawrance*, 579 N.E.2d 32, 40 (Ind. 1991).

21. IND. CODE § 16-8-12-1(2) (1988).

22. *Lawrance*, 579 N.E.2d at 40.

23. *Id.*

24. *Id.* at 43.

25. *Id.* at 41.

26. See, e.g., *In re Drabick*, 245 Cal. Rptr. 840 (Cal. Ct. App.), *cert. denied*, 488 U.S. 958 (1988); *In re Jobes*, 529 A.2d 434 (N.J. 1987).

27. *In re Lawrance*, 579 N.E.2d 32, 42 (Ind. 1991).

28. *Id.*

29. *Id.*

care providers involved in these types of treatment decisions act conservatively in light of internal constraints on their professional conduct.³⁰ Third, the court pointed to an HCCA provision which mandates good faith on the part of both family members and physicians when faced with difficult health care issues.³¹ Finally, when there is disagreement amongst family and physician, the parties may seek redress from the courts.³²

On the third issue, the court held that the appointment of a guardian for Sue Ann Lawrance constituted error.³³ The court recognized that four statutory requirements must be met before a court can appoint a guardian. These are: (1) a guardian has not been appointed for the incapacitated person or minor; (2) an emergency exists; (3) the welfare of the incapacitated person or minor requires immediate action; and (4) no other person appears to have authority to act under the circumstances.³⁴ The supreme court found that the fourth requirement was not met because the Lawrance family clearly appeared to have authority pursuant to the HCCA. The court also adhered to the HCCA requirement that petitioners be health care providers or interested individuals.³⁵ The court interpreted the word "interested" to mean "strangers need not apply."³⁶

The *Lawrance* opinion clarifies some issues regarding the health care statutes and their impact on individuals and family members. The supreme court has clearly stated that artificially provided nutrition and hydration are medical treatments which can be withheld or withdrawn pursuant to the HCCA. Also clear is that Indiana's health care statutes are designed to provide individuals the opportunity to proclaim their health care wishes without having to go through formal court proceedings.

The court's approach to these delicate issues is consistent with that of other states, including the famous 1976 New Jersey Supreme Court decision in *In re Quinlan*³⁷ granting authority to a parent to remove his comatose daughter from a ventilator. Since then, numerous states have held that the withdrawal of nutrition and hydration is allowed when a patient is in a persistent vegetative state.³⁸ Furthermore, the Council on Ethical and Judicial Affairs of the American Medical Association has

30. *Id.*

31. *Id.* at 43.

32. *Id.*

33. *Id.*

34. IND. CODE § 29-3-3-4(a) (Supp. 1991).

35. *Id.* § 16-8-12-7(a)

36. *In re Lawrance*, 579 N.E.2d 32, 44 (Ind. 1991).

37. 355 A.2d 647 (N.J. 1976).

38. See cases cited *supra* note 19.

stated that it is not unethical to discontinue all means of life-prolonging treatment, including nutrition and hydration, for patients who are either terminally ill or in an irreversible coma.³⁹

To conclude, the *Lawrance* decision strikes a balance in favor of private decisionmaking when there is unanimity among the truly interested parties — the close family and the physician. A pivotal fact in this case was that the health care providers and the Lawrance family “unanimously” agreed on what was best for Sue Ann.⁴⁰ The Indiana Supreme Court has clearly stated that courts, unless needed to resolve disputes in major decisions, do not have a role in medical decisionmaking under the HCCA. Furthermore, outsiders, such as the advocacy group that petitioned to become Sue Ann’s guardian, clearly do not have a role. In clarifying these questions, the supreme court has greatly assured the privacy of medical decisionmaking in Indiana.

B. Amendments to the Power of Attorney Act

In 1991, the Indiana General Assembly added an important provision to the Power of Attorney Act to address the consent or refusal of health care.⁴¹ The provision specifically empowers the attorney-in-fact to make decisions in the name of the principal regarding the withdrawal of health care.⁴² Before this power can be invoked, section 30-5-5-17(a) requires that the power of attorney document contain specific language or its substantial equivalent.⁴³ In essence, the new provision incorporates health care decisionmaking into the power of attorney document. As a result,

39. American Medical Ass’n, Council on Ethical and Judicial Affairs, Current Opinions § 2.18 (amended Mar. 15, 1980).

40. *Lawrance*, 579 N.E.2d at 43.

41. IND. CODE § 30-5-5-17 (Supp. 1991).

42. *Id.*

43. The specific language recommended by the statute is as follows:

I authorize my health care representative to make decisions in my best interest concerning withdrawal or withholding of health care. If at any time, based on my previously expressed preferences and the diagnosis and prognosis, my health care representative is satisfied that certain health care is not or would not be beneficial, or that such health care is or would be excessively burdensome, then my health care representative may express my will that such health care be withheld or withdrawn and may consent on my behalf that any or all health care be discontinued or not instituted, even if death may result.

My health care representative must try to discuss this decision with me. However, if I am unable to communicate, my health care representative may make such a decision for me, after consultation with my physician or physicians and other relevant health care givers. To the extent appropriate, my health care representative may also discuss this decision with my family and others, to the extent they are available.

Id. § 30-5-5-17(a).

the power of attorney has become a more complete document by encompassing a wider range of powers into a single document.

II. INDIANA'S HOSPITAL CARE FOR THE INDIGENT AND THE MEDICAID PROGRAM

A crushing responsibility for states in recent years has been financing health care for the indigent through Medicaid and other state programs such as Indiana's Hospital Care for the Indigent (HCI) program.⁴⁴ The HCI program provides benefits for poor Indiana residents, who without immediate medical attention, might die, suffer serious impairment to bodily functions, or suffer from serious dysfunction of a bodily organ.⁴⁵ Like other states, Indiana has faced serious cost pressures in its Medicaid and HCI programs. Thus, it is not surprising that Indiana courts have adjudicated cases involving cost containment issues in these programs.

In *Lutheran Hospital of Fort Wayne, Inc. v. Indiana Department of Public Welfare*,⁴⁶ the Indiana Supreme Court interpreted the HCI Act with respect to hospital expenses of a county jail inmate hospitalized pursuant to a detention order after attempting suicide. In August 1986, Michael Campbell was transferred from the Noble County Jail to Lutheran Hospital under a seventy-two hour emergency admittance following two suicide attempts within two days. After Campbell's discharge, the hospital requested benefits under the HCI Act.

Noble County denied the hospital's request, stating that the Act does not cover mental health problems. On administrative appeal to the Department of Public Welfare, the State Board of Public Welfare upheld an administrative law judge's decision denying HCI payment to the hospital, reasoning that Campbell's medical condition did not meet the medical criteria established in the HCI. On judicial review, the Steuban Circuit Court and the court of appeals affirmed. The court of appeals also ruled that Campbell failed to meet the nonmedical criteria because his status as a county jail inmate was analogous to a noneligible department of correction's inmate.

The Indiana Supreme Court's standard for judicial review was whether the Board's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.⁴⁷ The substantive issues before the supreme court were whether Campbell was eligible for benefits under the HCI Act in accordance with the medical and nonmedical requirements and if eligible, for what benefits.

44. IND. CODE §§ 12-5-6-1 to -8 (1988 & Supp. 1991).

45. IND. CODE § 12-5-6-2.1(a) (1988).

46. 571 N.E.2d 542 (Ind. 1991).

47. *Id.* at 544. See also IND. CODE § 4-21.5-5-14(d)(1) (1988).

The supreme court ruled that Campbell met the medical and nonmedical criteria for HCI benefits, but remanded for consideration of the requisite financial eligibility.⁴⁸ The supreme court stated that "the statute relates to emergency care, not preventive care, and that attempted suicide meets the definition of emergency care under HCI."⁴⁹ The court also stated that attempted suicide "appears to be 'placing the person's life in jeopardy' and therefore, meets the emergency medical situation contemplated by the HCI."⁵⁰ Furthermore, the court found nothing in the words or purpose of the statute that suggests that emergencies, as contemplated under the HCI, apply exclusively to a person's physical health. Therefore, the court held that when a patient is admitted to a hospital pursuant to a seventy-two hour detention order, the patient's mental condition, even in the absence of a physical illness, can form the basis of a valid claim for benefits under HCI.⁵¹

The court also ruled that Campbell, as an inmate of a county jail, could qualify for HCI benefits because he met the nonmedical criteria of the Act.⁵² The State attempted to equate Campbell's status as an inmate at the county jail to that of a noneligible inmate of the Department of Correction.⁵³ The court rejected this analogy because the statute clearly states that a person is subject to the Department of Correction only after conviction.⁵⁴ Therefore, Campbell was not an inmate of the Department of Correction even though he was an inmate at the county jail.⁵⁵

The court then considered the second issue regarding the amount of benefits the hospital was entitled to receive. The hospital contended that it was entitled to payments for Campbell's entire stay because the Act permits coverage for all medical costs incurred from the direct consequence of an emergency medical condition. To further support its claim, the hospital asserted that the statute permits HCI payments until the patient is "medically stable and can safely be discharged."⁵⁶ The State argued that once HCI benefits are approved, the benefits do not automatically continue until the patient is discharged. The State pointed

48. *Lutheran Hosp.*, 571 N.E.2d at 544-45.

49. *Id.*

50. *Id.* at 545.

51. *Id.*

52. *Id.*

53. IND. CODE § 12-5-6-2.1(e) (1988) provides: "This chapter does not apply to inmates and patients of institutions of the department of corrections, the state board of health, or the department of mental health."

54. *Lutheran Hosp. of Fort Wayne, Inc. v. Indiana Dep't of Pub. Welfare*, 571 N.E.2d 542, 545 (Ind. 1991). See IND. CODE § 11-8-1-9 (1988).

55. *Lutheran Hosp.*, 571 N.E.2d at 545.

56. *Id.* at 546. IND. CODE § 12-5-6-12(b) (1988).

out that the legislature has mandated limitations on the duration of services through regulations.⁵⁷ The State then invoked Department of Public Welfare regulations which provide that HCI benefits "shall be available, consistent with reasonable medical necessity, until such time as the patient is medically stable and can be safely discharged."⁵⁸ The regulation defines "stable" as "the alleviation of the condition which prompted the hospitalization."⁵⁹

The supreme court concluded that HCI benefits terminate when a patient becomes medically stable and that it is the hospital's responsibility to document fully the condition of the patient through the person's hospital stay so that the Welfare Department can determine the patient's eligibility for HCI benefits.⁶⁰ Based on the record, the court concluded that proof of Campbell's continued hospital stay, without more, was not sufficient evidence that his condition continued to be unstable and remanded to determine whether his hospital stay in excess of seventy-two hours was medically necessary.⁶¹

This decision established that a person suffering solely from a mental condition could qualify for HCI benefits provided that other HCI eligibility criteria are met. This is an important expansion of the HCI program in practice. The supreme court also confirmed that HCI benefits are available only for the period of time in which the patient remains medically unstable and that the hospital has the burden of documenting this condition for HCI payment purposes.

Of note is a preliminary ruling of the court of appeals in *Indiana State Board of Public Welfare v. Tioga Pines Living Center, Inc.*,⁶² a major provider challenge to Medicaid payment levels under the Boren Amendment. The Boren Amendment requires that a state's Medicaid payment methodology result in rates that are "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations and quality and safety standards."⁶³ The *Tioga Pines* case was a challenge by Indiana's nursing

57. See IND. CODE § 12-5-6-12(a)(2) (1988).

58. *Lutheran Hosp.*, 571 N.E.2d at 545 (quoting IND. ADMIN. CODE tit. 470, r. 11.1-2-1(b) (1988)).

59. *Id.*

60. *Id.*

61. *Id.*

62. 575 N.E.2d 303 (Ind. Ct. App. 1991).

63. 42 U.S.C. § 1396a(a)(13)(A) (1988). See generally Eleanor D. Kinney, *Rule and Policy Making Under the Medicaid Program: A Challenge to Federalism*, 51 OHIO ST. L.J. 855, 872 (1990) [hereinafter Kinney, *Rule and Policy Making*].

facilities to the Department of Public Welfare's regulations enacted as a result of the Boren Amendment that link increases in Medicaid reimbursement for nursing facilities to the Gross National Product Implicit Price Deflator⁶⁴ thereby reducing reimbursement to nursing homes by an estimated \$4,000,000 per month.

The trial court granted a preliminary injunction which required the state to pay into escrow the difference between the amounts paid under the new cap rate and the amount which would have been paid under the previous formula. The court also certified the cause as a class action as to the issues and the damages. On appeal, the court of appeals considered whether the trial court erred in granting the preliminary injunction, whether judicial review was available to the nursing facilities before they had exhausted their administrative remedies, and whether the trial court erred by certifying 785 skilled nursing facilities as a class pursuant to Indiana Trial Rule 23(B)(3).

In determining the first issue, the court stated that a preliminary injunction is proper only when there is no adequate remedy at law available.⁶⁵ After reviewing the trial court's findings, the court found that the only harm the nursing homes would suffer before a final judgment was entered would be monetary.⁶⁶ It has been held that mere economic injury does not warrant the granting of a preliminary injunction, even if the sale or closing of some facilities would result without an adequate remedy at law.⁶⁷ Conforming to this principle, the court of appeals held that the trial court's grant of the injunction was clearly erroneous because the nursing facilities had an adequate remedy at law.⁶⁸

Regarding the issue of exhaustion of administrative remedies, the court recognized three exceptions to the general proposition that litigants must exhaust administrative remedies before seeking judicial relief. Specifically, direct resort to the courts is justified when compliance with a rule will be futile, when the statute is charged to be void on its face, or when irreparable injury will result.⁶⁹ The court then determined that the instant challenge to the rule establishing Indiana's rate caps was analogous to a challenge to the validity of a statute and therefore, fell within one of the exceptions to the exhaustion requirement.⁷⁰

64. See IND. ADMIN. CODE tit. 470, r. 5-4.1-9(c)(3) (Supp. 1991).

65. *Tioga Pines*, 575 N.E.2d at 306.

66. *Id.*

67. *Id.* (citing *Whiteco Indus., Inc. v. Nickolick*, 549 N.E.2d 396, 399 (Ind. Ct. App. 1990)).

68. *Id.*

69. *Id.* at 307 (citing *Indiana High Sch. Athletic Ass'n v. Raike*, 329 N.E.2d 66, 82 (Ind. Ct. App. 1975)).

70. *Id.*

The court also pointed out the decision of the United States Supreme Court in *Wilder v. Virginia Hospital Association*,⁷¹ holding that the Boren Amendment created privately enforceable rights under 42 U.S.C. § 1983.⁷² The court emphasized the implications of the *Virginia Hospital* decision for the *Tioga Pines* case: "Even if valid, state regulations providing for review of individual claims for payment do not foreclose resort to § 1983 relief. Thus, the trial court also has § 1983 jurisdiction to entertain this case."⁷³ Finally, the court of appeals, relying on Indiana Trial Rule 23(B)(3), held that the class certification was proper because all of the nursing homes would be affected by the questioned regulations.⁷⁴

The *Tioga Pines* decision affirms that a preliminary injunction can only be issued when a party does not have an adequate remedy at law, and the fact that the a party will suffer monetary injury, no matter how severe, does not warrant the issuance of a preliminary injunction. However, the decision recognizes that challenges to Medicaid regulations are analogous to challenges to the validity of statutes and may fall under an exception to the administrative exhaustion requirement. Further, 42 U.S.C. § 1983 provides a basis for challenging state medical payment policies that do not comport with federal statutory requirements set forth in the Boren Amendment. The decision also clarifies the requirements needed for class certification. A decision on the merits in this case will have important implications for future Medicaid payment policy in Indiana.

III. AIDS AND ACCESS TO PRIVATE HEALTH INSURANCE

The key case *Westhoven v. Lincoln Foodservice Products, Inc.*,⁷⁵ before the Indiana Civil Rights Commission (ICRC), concerns the alleged discrimination against an AIDS victim in obtaining health insurance. In January 1988, Lincoln established a new plan which was generous for most catastrophic illnesses, but placed severe restrictions and limitations on benefits for individuals with AIDS or AIDS-Related Complex (ARC). Prior to 1988, Lincoln's plan contained no exclusion or limitation on expenses resulting from AIDS or ARC. Westhoven charged that his

71. 110 S. Ct. 2510 (1990).

72. See 42 U.S.C. § 1983 (1988). See also Kinney, *Rule and Policy Making*, *supra* note 63, at 872.

73. *Indiana State Bd. of Pub. Welfare v. Tioga Pines Living Ctr., Inc.*, 575 N.E.2d 303, 307-08 (Ind. Ct. App. 1991) (citations omitted).

74. *Id.* at 308.

75. No. EMha89030350 (Ind. Civil Rts. Comm'n Mar. 22, 1991) (on file with author) [hereinafter Findings of Fact], *rev'd*, No. 35C01-9109-CP-00396 (Huntington Cir. Ct. Feb. 18, 1992).

employer's health insurance plan discriminated against him on the basis of his handicap in violation of the Indiana Civil Rights Law (ICRL).⁷⁶ The ICRL prohibits discrimination on the basis of handicap, defined as a "physical condition" that constitutes a "substantial disability."⁷⁷ The ICRL defines unlawful discriminatory practices to include the "exclusion of a person" or "a system that excludes persons" from "equal opportunities" because of "handicap" or other characteristics.⁷⁸

The new Lincoln plan included a \$50,000 maximum lifetime benefit to employees whose conditions are caused by AIDS or ARC. With the exception of mental illness, the plan allowed a maximum lifetime benefit of \$1,000,000 for all other health conditions. The plan placed a \$25,000 annual maximum on expenses related to AIDS or ARC, but contained no such calendar year maximum on benefits for other medical conditions. Further, the plan's major medical benefit was sharply curtailed for AIDS and ARC claims. Specifically, for all other conditions, the plan paid twenty percent of the first \$2,000 of covered expenses above the deductible and one hundred percent thereafter. For mental illness, AIDS, or ARC, the plan paid only eighty percent of in-patient services and fifty percent of out-patient services for all covered expenses in excess of the deductible.

The Commission's administrative law judge ruled that the ICRL applied and that discrimination against Westhoven occurred in this case, stating:

The Plan provides lesser major medical benefits to the class of handicapped employees who suffer from AIDS or ARC than it provides to employees not so handicapped. This disparity of treatment based solely upon the handicap of the employee causes the exclusion of the employee, Westhoven, from equal opportunities in employment solely because of his handicap, AIDS, and therefore, is a discriminatory practice.⁷⁹

The Commission also concluded that the plan "on its face classifies and limits benefits to employees whose handicap is AIDS solely on the basis of the handicap."⁸⁰ Therefore, the plan was a "system that excludes

76. See IND. CODE § 22-9-1-3 (1988).

77. *Id.*

78. *Id.*

79. Proposed Findings of Fact, Conclusions of Law, and Order at 11, *Westhoven v. Lincoln Foodservice Prods., Inc.*, No. EMha89030350 (Ind. Civil Rts. Comm'n Dec. 3, 1990) [hereinafter Proposed Findings]. The Proposed Findings, written by the hearing officer who heard initial arguments in *Westhoven*, were adopted by the Civil Rights Commission as part of its final ruling in the case. Findings of Fact, *supra* note 75, at 3.

80. Findings of Fact, *supra* note 75, at 11.

persons from equal opportunities because of handicap' and, therefore, constituted a discriminatory practice'' in violation of Indiana law.⁸¹ The administrative law judge also ruled that the federal Employee Retirement Income Security Act of 1972 (ERISA)⁸² does not preempt the application of the ICRL in this case.⁸³

On August 29, 1990, the Commission considered whether it had subject matter jurisdiction over Lincoln's self-funded insurance plan or whether it was preempted by ERISA.⁸⁴ ERISA preempts state laws that relate to employee benefit plans.⁸⁵ However, ERISA specifically exempts from the preemption clause state laws that regulate insurance,⁸⁶ but it also provides that state insurance laws cannot deem an employee benefit plan to be an insurance company and so regulate the employee benefit plan.⁸⁷

In determining whether the ICRC had subject matter jurisdiction, the Commission relied heavily on *Shaw v. Delta Air Lines, Inc.*⁸⁸ In *Shaw*, the United States Supreme Court held that New York's Human Rights Law was preempted to the extent it prohibited practices that were lawful under ERISA.⁸⁹ Applying *Shaw*, the Commission concluded that it had subject matter jurisdiction over the case and that the Indiana Civil Rights Law does not prohibit practices that are permitted under federal law.⁹⁰

Having decided that ERISA does not preempt Indiana's civil rights laws in this case, the Commission addressed the question of whether federal or state law allowed Lincoln to discriminate against Westhoven under its self-funded insurance plan. The ICRC then ruled that Lincoln's new plan violated the Indiana Civil Rights Law⁹¹ in that the plan intentionally provided for lesser benefits to those suffering from AIDS.⁹²

The next issue was whether the practice described is permitted under any federal law. The Commission concluded that only the federal Vo-

81. See IND. CODE § 22-9-1-3(A)(2) (1988).

82. 29 U.S.C. §§ 1001-1461 (1988 & Supp. I 1989).

83. Proposed Findings, *supra* note 79, at 11-12.

84. Both parties agreed that the insurance plan was a welfare benefit plan as defined by ERISA. ERISA covers all employee benefit plans which are either established or maintained by any employer who is engaged in commerce, industry, or any activity which affects commerce.

85. 29 U.S.C. § 1144(a) (1988).

86. *Id.* § 1144(b)(2)(A).

87. *Id.* § 1144(b)(2)(B).

88. 463 U.S. 85 (1983).

89. *Id.* at 108.

90. Order, *Westhoven v. Lincoln Foodservice Prods., Inc.*, No. EMha89030350, slip op. at 12 (Ind. Civil Rts. Comm'n Aug. 29, 1990).

91. See IND. CODE § 22-9-1-3 (1988).

92. Findings of Fact, *supra* note 75, at 3.

cational Rehabilitation Act of 1973,⁹³ which prohibits discrimination by employers on the basis of handicap, was applicable.⁹⁴ Several federal court cases have clearly stated that AIDS constitutes a handicap under the Rehabilitation Act.⁹⁵ Section 794(a) of the Act prohibits discrimination on the basis of handicap in programs and activities receiving federal funding issued by various agencies.⁹⁶ Pursuant to this section, the Department of Justice issued Guidelines on Nondiscrimination on the Basis of Handicap in Federally Assisted Programs.⁹⁷ Subsections 41.52(b), (c), and (d) of the guidelines specifically prohibit activities which adversely affect compensation and fringe benefits of handicapped employees.⁹⁸ Because Lincoln's practice is prohibited under federal law, and because Indiana's civil rights laws are consistent with the applicable federal law, the ICRC determined it had subject matter jurisdiction over Westhoven's claim.

On judicial review of the Commission's decision, the Huntington County Circuit Court ruled that ERISA preempts Indiana's handicap discrimination laws and that consequently, the ICRC did not have jurisdiction to regulate Lincoln's self-funded plan.⁹⁹ The court also ruled that it had concurrent jurisdiction with the federal courts to decide ERISA claims.¹⁰⁰ This decision is consistent with recent decisions from other jurisdictions determining whether state civil rights authorities protect employees from discrimination under employer health insurance plans.¹⁰¹

It is important to note that this issue has been addressed by the Americans with Disabilities Act. Specifically, the Act, which prohibits discrimination against the disabled in employment, public services, and accommodations and telecommunications, expressly exempts any "insurer, hospital, or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering

93. 28 U.S.C. §§ 701-796 (1988 & Supp. I 1989).

94. Proposed Findings, *supra* note 79, at 15-17 (citing 29 U.S.C. §§ 706, 793, 794 (1988)).

95. See, e.g., *Doe v. Garrett*, 903 F.2d 1455, 1459 (11th Cir. 1988) (citing *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987)); *Martinez v. Hillsborough County Sch. Bd.*, 861 F.2d 1502 (11th Cir. 1988).

96. See 28 U.S.C. § 794(a) (1988).

97. 28 C.F.R. §§ 41.1 to -.7 (1991).

98. *Id.* § 41.52(b)-(d).

99. *Lincoln Foodservice Prods., Inc. v. Westhoven*, No. 35C01-9109-CP-00396, slip op. at 2 (Huntington Cir. Ct. Feb. 18, 1992).

100. *Id.*

101. See *McGann v. H&H Music Co.*, 946 F.2d 401 (5th Cir. 1991); *Owens v. Storehouse, Inc.*, 773 F. Supp. 416 (N.D. Ga. 1991). See generally Mary Ann Bobinski, *Unhealthy Federalism: Barriers to Increasing Health Care Access for the Uninsured*, 24 U.C. DAVIS L. REV. 255 (1990); Milt Freudenheim, *Employers Winning Right to Cut Back Medical Insurance*, N.Y. TIMES, Mar. 29, 1992, at A1.

such risks that are based on or not inconsistent with state law.”¹⁰² Thus, the Act specifically declines to address barriers to access to health insurance for the disabled that are based on current principles of medical underwriting. However, the Act does prohibit employers from discriminating against disabled individuals who might be high users of health insurance plans in making hiring decisions.¹⁰³ Important language in the report of the House Judiciary Committee on the Act confirms congressional intent in this regard:

For example, an employer could not deny a qualified applicant a job because the employer's current insurance plan does not cover the person's disability or because of an anticipated increase in the costs of the insurance. Moreover, while a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section, the plan may not refuse to insure or refuse to continue to insure, or limit the amount, extent or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles, or is related to actual or reasonably anticipated experience.¹⁰⁴

IV. MEDICAL MALPRACTICE

During the past year, the court of appeals decided several important decisions in the medical malpractice field. Although procedural in nature, these decisions will have crucial implications for how Indiana's malpractice compensation system will operate in the future.

In *Eakin v. Reed*,¹⁰⁵ the court of appeals considered whether a loan receipt agreement qualified as a payment to settle the provider's liability in a large claim. In deciding the issue, the court interpreted the meaning of "payment" as used in the Indiana Patient Compensation Fund's (PCF) settlement procedures.¹⁰⁶

Reed brought a medical malpractice action against a hospital and physician after receiving treatment for injuries sustained in an automobile

102. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, 369-70 (to be codified at 42 U.S.C. § 12101).

103. *Id.*, 104 Stat. 369, § 501(c)(1).

104. H.R. REP. No. 485, 101st Cong., 2d Sess. 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 494.

105. 567 N.E.2d 148 (Ind. Ct. App. 1991).

106. IND. CODE § 16-9.5-4-3 (1988). See Eleanor D. Kinney et al., *Indiana's Medical Malpractice Act: Results of a Three-Year Study*, 24 IND. L. REV. 1275 (1991) [hereinafter Kinney, *Study*].

accident. Reed also filed a products liability claim against Ford Motor Company in federal court. After both claims were filed, Reed entered into a loan receipt agreement with the hospital and the physician providing that the health care providers would make a present payment of slightly more than \$75,000 toward a periodic payment plan which would total \$101,000 in interest-free loans. Both parties agreed that the payment would satisfy any liability on the part of the health care providers. Furthermore, Reed promised to reimburse the health care providers for their payments if he was successful in his suit against Ford Motor Company. Based on the loan receipt agreement, Reed then sought a settlement of \$400,000 from the Patient Compensation Fund.¹⁰⁷

The trial court held that Reed met the statutory requirements to recover from the Fund because the periodic payment plan discussed would total \$101,000, which met the statutory amount needed before payment from the Fund is allowed. On appeal, the Insurance Commissioner argued that Reed did not meet the statutory requirements because the conditional nature of the payments could relieve the health care providers of their statutory financial obligation if Reed successfully recovered on his products liability suit against Ford Motor Company.

The court of appeals reversed the trial court's decision and remanded with instructions to hold Reed's complaint for excess damages in abeyance until the products liability claim was decided or until the health care providers' payments were made irrevocable.¹⁰⁸ The court of appeals based its decision on legislative intent. The court reiterated the primary objective of the statute as articulated by the court's 1990 decision in *Eakin v. Mitchell-Leech*,¹⁰⁹ in which Judge Garrard said that "the statute clearly and unambiguously requires that the health care provider or its insurer shall have paid the maximum \$100,000 . . . before access may be had to the fund."¹¹⁰ Therefore, the court in *Reed* held that the word "payment" means "the permanent transfer of money from the health care providers to the claimant."¹¹¹ To hold otherwise would render the Fund responsible for damages without any statutorily required contribution from the health care providers.¹¹² *Reed* strengthens the Act's requirements by clarifying that the payment must be a permanent and irrevocable transfer of money before the Fund can be accessed.

107. To be eligible for PCF payment, one or more defendants must pay at least \$75,000 in present dollars with a future value of \$100,000. IND. CODE § 16-9.5-2-2.2 (1988). See Kinney, *Study, supra* note 106, at 1280.

108. *Eakin*, 567 N.E.2d at 150.

109. 557 N.E.2d 1057 (Ind. Ct. App. 1990).

110. *Id.* at 1063 (Garrard, J., dissenting).

111. See *Eakin v. Reed*, 567 N.E.2d 148, 150 (Ind. Ct. App. 1991).

112. *Id.*

The second important medical malpractice case during the survey period was *Galindo v. Christensen*,¹¹³ in which the court of appeals addressed whether the Marion County Circuit Court had subject matter jurisdiction over a motion for a preliminary determination of law, whether the trial court had the statutory authority to dismiss a proposed complaint, and whether the trial court abused its discretion when it ordered a dismissal of Galindo's proposed complaint.

On December 23, 1985, Galindo filed a complaint for damages with the Commissioner of Insurance under the Indiana Medical Malpractice Act against Dr. Christensen and Ball Memorial Hospital. On November 15, 1988, nearly three years after Galindo's complaint was filed, the parties tentatively selected a medical review panel and panel chair. The chair directed Galindo to submit his evidence by January 20, 1989. Galindo did not submit his evidence within the allotted time period or within the 180-day time period required under the Act for the review panel to render its written opinion.¹¹⁴ In September 1989, the Marion County Circuit Court dismissed Galindo's complaint pursuant to a defense motion.

On appeal, Galindo argued that the trial court did not have subject matter jurisdiction over the pending motion because Christensen and Ball Memorial Hospital failed to issue and serve summonses upon the Commissioner and the panel chair as required by statute.¹¹⁵ The court, construing the statute according to its plain, ordinary, and usual meaning, concluded that the trial court had subject matter jurisdiction to consider Galindo's proposed complaint and held that the issuance and service of a summons was not a prerequisite to bestowing the trial court with subject matter jurisdiction.¹¹⁶ Rather, "the filing of the copy of the proposed complaint and motion with the clerk" conferred subject matter jurisdiction upon the court.¹¹⁷

113. 569 N.E.2d 702 (Ind. Ct. App. 1991).

114. See IND. CODE § 16-9.5-9-3.5(a) (1988).

115. The statute provides:

Any party to a proceeding commenced under this article . . . may invoke the jurisdiction of the court by paying the statutory filing fee to the clerk and filing a copy of the proposed complaint and motion with the clerk. The filing of a copy of the proposed complaint and motion with the clerk shall confer jurisdiction upon the court over the subject matter and the parties to the proceeding for the limited purposes stated in this chapter. . . . The moving party or his attorney shall cause as many summonses as are necessary to be issued by the clerk and served on the commissioner, each non-moving party to the proceedings and the chairman of the medical review panel.

Id. § 16-9.5-10-2.

116. *Galindo*, 569 N.E.2d at 704 (citing *Merit Bd. v. Peoples Broadcasting Corp.*, 547 N.E.2d 235 (Ind. 1989)).

117. *Id.*

Galindo also argued that the trial court did not have the statutory authority to dismiss the proposed complaint because the motion did not fall within the court's limited jurisdiction. The court of appeals observed that the exclusionary provision of Indiana Code section 16-9.5-10-1 was inapplicable because dismissal of a proposed complaint for failure to submit evidence in a timely manner is not an issue reserved for the medical review panel.¹¹⁸ Rather, the medical review panel may only decide whether "the defendant or defendants acted or failed to act within the appropriate standards of care as charged in the complaint."¹¹⁹ Furthermore, because the Medical Malpractice Act empowers the trial court to impose sanctions for failure to proceed with evidence, the trial court had jurisdiction to address the issue of dismissal.¹²⁰

Finally, Galindo argued that the trial court abused its discretion in ordering dismissal of his proposed complaint with prejudice. The court of appeals held that trial courts have the statutory authority to impose appropriate sanctions upon a party who, without good cause, fails to act as required by the Medical Malpractice Act.¹²¹ Furthermore, the court stated that "dismissal is a sanction which a trial court has inherent authority to order in its discretion."¹²² However, a court must conduct a hearing before imposing sanctions to allow the party against whom sanctions are sought an opportunity to show that the failure to act was for good cause.¹²³ In the instant case, Galindo was not provided with this opportunity.

In this decision, the court of appeals made it clear that trial courts have subject matter jurisdiction under the Act to determine preliminary questions of law and can dismiss a proposed medical malpractice action, as well as levy other appropriate sanctions on a party, because of failure to comply with the Act. However, a trial court must conduct a hearing which allows a party to show why his inaction was for good cause prior to dismissing the proposed action or applying sanctions.

In a subsequent decision on the same issue, *Ground v. Methodist Hospital of Indiana, Inc.*,¹²⁴ the court of appeals upheld the grant of the defendant's motion to dismiss the complaint for failure to prosecute pursuant to Indiana Trial Rule 41(E).¹²⁵ In dismissing the complaint, the trial court concluded that the plaintiff "had failed to act in accordance

118. *Id.* at 705. See IND. CODE § 16-9.5-9-7 (1988).

119. Galindo v. Christensen, 569 N.E.2d 702, 705 (Ind. Ct. App. 1991).

120. *Id.*

121. *Id.* at 706.

122. *Id.* (citing IND. T. R. 37).

123. *Id.* See IND. CODE § 16-9.5-9-3.5(b) (1988).

124. 576 N.E.2d 611 (Ind. 1991).

125. *Id.* at 614.

with I.C. 16-9.5-9-3.5.”¹²⁶ The court of appeals concluded that the trial court’s action fell well within its powers to sanction litigants who fail to comply with court rules and other requirements.¹²⁷

Galindo and *Ground* are potentially important cases for making Indiana’s medical malpractice reforms more efficient. Major concerns about Indiana’s system have been the slowness of the medical review process,¹²⁸ as well as the large backlog of open claims.¹²⁹ *Galindo* and *Ground* will allow courts and parties to make cases move more quickly and thereby address these concerns.

126. *Id.* at 612.

127. *Id.* at 614.

128. Kinney, *Study*, *supra* note 106, at 1303.

129. *Id.* at 1304 (finding that about two-thirds of Indiana’s claims filed between 1975 and December 1988 has not closed according to the records of the Indiana Department of Insurance).



Survey of Recent Developments in Insurance Law

JOHN C. TRIMBLE*

INTRODUCTION

The area of insurance law received a considerable amount of attention during the survey period.¹ In fact, there were probably twice as many insurance law cases reported in the last year as in any other year in recent memory. Although there were many interesting cases,² this Article

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1. The survey period for this issue is approximately January 1, 1991, to December 31, 1991. The survey period for this Article last year was approximately June, 1989 to August 1, 1990. Cases that were reported between August 1, 1990, and January 1, 1991, will also be mentioned in this Article.

2. Many cases during the survey period addressed or explained existing insurance law. Each of the cases mentioned in this footnote is worthy of review. *See Transamerica Ins. Servs. v. Kopco*, 570 N.E.2d 1283 (Ind. 1991) (addressing the interpretation under Indiana law of an alienation exclusion in a liability policy); *Egnatz v. Medical Protective Co.*, 581 N.E.2d 438 (Ind. Ct. App. 1991) (addressing an insurer's duty to renew medical malpractice insurance); *Meridian Mut. Ins. Co. v. Trueblood & Graham*, 577 N.E.2d 606 (Ind. Ct. App. 1991) (dealing with the right of a medical insurer to recover payments for medical expenses to its insured out of any recovery the insured received from the third party tort-feasor); *Weger v. Lawrence*, 575 N.E.2d 659 (Ind. Ct. App. 1991) (addressing the question of whether an automobile dealer has a duty to ascertain whether the buyer of an automobile has insurance prior to giving the buyer an interim registration plate); *American States Ins. Co. v. Adair Indus., Inc.*, 576 N.E.2d 1272 (Ind. Ct. App. 1991) (dealing with the question of whether a "family member" needed to have permission to use an automobile within the definition of the omnibus clause in the policy); *Richey v. Chappell*, 572 N.E.2d 1338 (Ind. Ct. App. 1991) (addressing the discoverability of an insurance company claim investigative file); *Schierenberg v. Howell-Baldwin*, 571 N.E.2d 335 (Ind. Ct. App. 1991) (addressing the discoverability of an insurance company claim investigative file); *Wedzeb Enter., Inc. v. Aetna Life & Casualty Co.*, 570 N.E.2d 60 (Ind. Ct. App. 1991) (dealing with the question of whether an insurance company has a duty of good faith to explain to its insured the full ramifications and consequences of signing a release that absolves the company from any further performance under the insurance contract); *Cincinnati Ins. Co. v. Compton*, 569 N.E.2d 728 (Ind. Ct. App. 1991) (reviewing the elements and burden of proof in a civil case to avoid insurance coverage arising from the insured's arson); *Fitzgerald v. Travelers Ins. Co.*, 567 N.E.2d 159 (Ind. Ct. App. 1991) (dealing with the effect of a change of beneficiary in a life insurance policy when the change is in violation of a provisional order in a dissolution action and one party to the action dies); *Watson v. Golden Rule Ins. Co.*, 564 N.E.2d 302 (Ind. Ct. App. 1990) (addressing the elements that must be proven by an insurance carrier to rescind a policy of insurance because of material misrepresentations of the insured on the application); *State Farm Auto. Ins. Co. v. James*, 562 N.E.2d 777 (Ind. Ct. App. 1990) (this case is noteworthy because it touched upon the procedure that a judgment creditor of an insured must follow in order to pursue proceedings supplemental to judgment against an insurer).

will focus only upon those issues that are most likely to be confronted by an attorney in general practice. The cases reported in this Article will deal with the continuing evolution of Indiana law concerning the "intentional act" exclusion, automobile liability policy exclusions and conditions, selected miscellaneous cases, and a brief discussion of some of the practical statutory changes enacted by the 1991 Indiana General Assembly.

I. THE EXPECTED OR INTENDED INJURY EXCLUSION

The standard liability insurance policy available on the market today provides coverage to an insured for damages arising from an accident or occurrence. However, most policies exclude liability coverage if the injury or damage was "expected or intended" by the insured.³

The word "intended" was defined by an Indiana court in 1975 in *Home Insurance Co. v. Neilsen*.⁴ In *Neilsen*, the court found that intent to cause injury could be proved by demonstrating that the insured actually meant to cause the injury.⁵ The court also held that intent to cause injury could be proved circumstantially by showing that the nature and character of the insured's conduct was such that the insured's intent to cause injury could be inferred as a matter of law.⁶

The meaning of the word "expected" was not defined by an Indiana court until 1989 in *Indiana Farmers Mutual Insurance Co. v. Graham*.⁷ In *Graham*, the court held that an expected injury "means that the insured acted although he was consciously aware that the harm caused by his actions was practically certain to occur."⁸

During the survey period, there were at least seven cases that dealt with the subject of whether an injury caused by an insured's act was expected or intended. Two of the cases were ones in which the average person would not be surprised to see an insurance company raise the intentional act exclusion because the injuries were caused by guns.⁹ The remaining cases involved situations in which the average practitioner might not readily recognize that the intentional acts exclusion could be applicable.¹⁰

3. 1 MILLER'S STANDARD INSURANCE POLICIES ANN., 2, 214, 261 (ver. 3 1991).

4. 332 N.E.2d 240 (Ind. Ct. App. 1975).

5. *Id.* at 244.

6. *Id.*

7. 537 N.E.2d 510 (Ind. Ct. App. 1989).

8. *Id.* at 512.

9. See *Auto-Owners Ins. Co. v. Stroud*, 565 N.E.2d 1093 (Ind. Ct. App. 1991); *Bolin v. State Farm Fire & Casualty Co.*, 557 N.E.2d 1084 (Ind. Ct. App. 1990).

10. See *Red Ball Leasing, Inc. v. Hartford Accident & Indem. Co.*, 915 F.2d 306

The cases involving guns, *Bolin v. State Farm Fire & Casualty Co.*¹¹ and *Auto-Owners Insurance Co. v. Stroud*,¹² are noteworthy only because they demonstrate that it is not always easy for an insurance company to convince a court that an insured expected or intended to cause injury. The *Bolin* case involved a young man shooting a pellet gun from a car at a passing motorist, while *Stroud* dealt with a young man who fired a shotgun at point blank range through a door in order to thwart a burglar's efforts to break into a store. In each case, the court made it clear that an insurer must prove a high expectation of injury or very clear intent to cause injury before the insurer's duty to defend and indemnify will be relieved.¹³ In particular, the *Bolin* case demonstrates that mere reckless conduct will not suffice to exclude coverage.¹⁴ Even though the insurers in *Bolin* and *Stroud* were unsuccessful, anyone reading the cases would not be surprised that the insurers attempted to avoid coverage. The same cannot necessarily be said for the remaining cases that were decided last year.

One very interesting case was *Red Ball Leasing, Inc. v. Hartford Accident & Indemnity Co.*¹⁵ The named insured, Red Ball Leasing, was a company that leased and sold commercial trucks through one of its subsidiaries. The company had entered into an agreement to lease several of its trucks to Red Star Moving Company. The financing for the leasing included a security interest in the trucks provided to Red Ball.

During the course of the leases, a mistake occurred in Red Ball's accounting system which caused Red Ball to believe that Red Star had defaulted in its monthly payments on the trucks. Consequently, Red Ball repossessed four of the trucks. Although the error was later discovered and remedied, Red Star sued Red Ball for breach of contract, intentional interference with business, and conspiracy to interfere with business. When Red Ball was sued, it sought a defense from its liability insurer, Hartford Accident and Indemnity Company.

Hartford declined to defend Red Ball for the reason that the repossession of the trucks was intentional, and not an "occurrence" or accident as required by the policy.¹⁶ Although the court and the parties

(7th Cir. 1990); *Trisler v. Indiana Ins. Co.*, 575 N.E.2d 1021 (Ind. Ct. App. 1991); *Wiseman v. Leming*, 574 N.E.2d 327 (Ind. Ct. App. 1991); *Davidson v. Cincinnati Ins. Co.*, 572 N.E.2d 502 (Ind. Ct. App. 1991); *City of Muncie v. United Nat'l Ins. Co.*, 564 N.E.2d 979 (Ind. Ct. App. 1990).

11. 557 N.E.2d 1084 (Ind. Ct. App. 1990).

12. 565 N.E.2d 1093 (Ind. Ct. App. 1991).

13. *Id.* at 1096; *Bolin*, 557 N.E.2d at 1090.

14. *Bolin*, 557 N.E.2d at 1088. (The insured had pled guilty to criminal recklessness, but that plea was not sufficient to exclude coverage.).

15. 915 F.2d 306 (7th Cir. 1990).

16. *Id.* at 308-09.

seemingly conceded that Red Ball may have acted on the good faith mistaken belief that it had the right to repossess the trucks, the actual act of repossession was an intentional act.¹⁷ The court held:

A volitional act does not become an accident simply because the insured's negligence prompted the act. Injury that is caused directly by negligence must be distinguished from injury that is caused by the deliberate and contemplated act initiated at least in part by the actor's negligence at some earlier point.¹⁸

At first blush, the denial of coverage in this case appears to be unjust. After all, the parties did not seriously dispute that Red Ball had acted negligently in its bookkeeping procedures. Nevertheless, the court's opinion is supported by numerous decisions from other jurisdictions that have held that there can never be an accident or occurrence when the actual damage has been caused by an intentional act.¹⁹

A similar case decided during the survey period was *City of Muncie v. United National Insurance Co.*²⁰ In this case, the City of Muncie was sued for various civil rights violations after the new mayor fired eleven city employees based upon their political affiliations. Subsequently, the city sued its liability insurance carrier for failure to defend and indemnify the city in the lawsuit.

United National denied coverage on the basis that the city's actions were intentional. The city's policy would have provided coverage for discrimination had it been committed as a result of some negligent act of the city. However, in the civil rights law suit, the federal district court found that the mayor's decision to terminate the employees was intentional.²¹ The Indiana Court of Appeals relied upon the definition of "intentional" found in *Home Insurance Co. v. Neilsen*²² to hold that the city was not entitled to insurance coverage.²³

This case is interesting because the facts indicate that the new mayor consulted with city attorneys before he discharged the employees. Therefore, the mayor arguably could have been acting in good faith. Nevertheless, the intentional and volitional act of firing the employees resulted in injuries or damages that were intended, and thus, there was no coverage.

17. *Id.* at 309-11.

18. *Id.* at 311.

19. *See id.* at 309 n.1.

20. 564 N.E.2d 979 (Ind. Ct. App. 1991).

21. *Id.* at 983.

22. 332 N.E.2d 240, 244 (Ind. Ct. App. 1975).

23. *City of Muncie*, 564 N.E.2d at 982.

*Davidson v. Cincinnati Insurance Co.*²⁴ and *Trisler v. Indiana Insurance Co.*²⁵ similarly dealt with coverage for intentional acts. In each of these cases, the insured had what is known as "personal injury" liability coverage. Some examples of the types of claims that were covered under the personal injury liability portions of the two policies in these cases were false arrest, false detention or imprisonment, malicious prosecution, wrongful entry or eviction, humiliation, libel, slander, defamation of character, and invasion of privacy.²⁶ The problem faced by the courts in each case was to decide whether the expected or intended acts exclusion should apply to exclude coverage to insureds who have coverage in their policy for liability arising from acts that are sometimes intentional in nature.²⁷ Each court resolved the apparent conflict in a different manner.

In *Davidson*, the insured was sued for violation of civil rights, malicious prosecution, abuse of process, conspiracy, fraud, bribery, and deceit. He was also accused of slander. As a result of the patently intentional allegations in the complaint, Cincinnati Insurance Company did not want to defend or indemnify Mr. Davidson. However, Mr. Davidson cogently made the point that his personal injury coverage, by its very definition, was designed to indemnify him for intentional acts such as malicious prosecution and slander.²⁸ He argued that if the intentional acts exclusion was applied to these acts, the coverage would be illusory.²⁹ The court agreed and held that there was a conflict between the intentional acts exclusion and the coverage provided under the personal injury section.³⁰ The court, therefore, was compelled to "satisfy the reasonable expectations of the insured."³¹ It held that there was coverage and Cincinnati Insurance should defend Davidson.³²

In *Trisler*, the court did not go as far as the court in *Davidson*. The dispute was over the question of whether the insurance company had wrongfully refused to defend Trisler in two actions.³³ In reviewing the situation the court did not discuss whether Trisler's personal injury coverage was illusory. By its analysis, the court appeared to acknowledge

24. 572 N.E.2d 502 (Ind. Ct. App. 1991).

25. 575 N.E.2d 1021 (Ind. Ct. App. 1991).

26. See *id.* at 1023; *Davidson*, 572 N.E.2d at 506.

27. *Trisler*, 575 N.E.2d at 1023-24; *Davidson*, 572 N.E.2d at 507.

28. *Davidson*, 572 N.E.2d at 507.

29. *Id.*

30. *Id.* at 508.

31. *Id.*

32. *Id.*

33. The court did not have to deal with the indemnity issue because the underlying lawsuits against Trisler were resolved by dismissal or summary judgment in his favor.

that the types of torts covered under the personal liability portion of the policy were sometimes "intentional" in nature. The court specifically noted, however, that there are times when the insurer's duty to defend is broader than its duty to indemnify.³⁴ Thus, the court held that Indiana Insurance should have at least defended Mr. Trisler against the claims of libel and slander under his personal injury coverage even though it might not have had to pay any judgments that were rendered against him.³⁵

One additional intentional acts case from the survey period was *Wiseman v. Leming*,³⁶ a case of first impression, in which the Indiana Court of Appeals was called upon to decide the duty to defend an insured under a homeowner's policy for allegations arising from sexual molestation of a child. In *Wiseman*, Timothy T. Leming pled guilty to molesting a child in his home. State Farm sought to avoid coverage under a homeowner's liability policy because Mr. Leming's acts were intentional. In an attempt to circumvent the exclusion, Mr. Leming called a psychologist to trial who testified that Leming's acts of molestation were not consciously intended to harm the victim. Based upon that testimony, Leming argued that he did not have the subjective intent to harm and that his claim should not be barred.

The court noted that this same issue had been decided in other jurisdictions,³⁷ and those courts had held that in sexual molestation cases, intent to harm could be inferred as a matter of law.³⁸ The court also noted that under Indiana law, our criminal statutes make child molesting a heinous criminal act that is inherently harmful.³⁹ Therefore, the court held that the insured's subjective intent was irrelevant.⁴⁰

In a further attempt to elude the intentional acts exclusion, Mr. Leming argued that he was mentally ill and that his illness should negate his intent to commit the harm.⁴¹ He relied on *West American Insurance Co. v. McGhee*.⁴² In *McGhee*, the Indiana Court of Appeals held that a person who is legally insane cannot commit an intentional act because he lacks the mental capacity to intend to cause harm.⁴³ The court, however, placed a high burden on the person claiming insanity to prove

34. *Trisler v. Indiana Ins. Co.*, 575 N.E.2d 1021, 1022-23 (Ind. Ct. App. 1991).

35. *Id.* at 1025.

36. 574 N.E.2d 327 (Ind. Ct. App. 1991).

37. *Id.* at 329.

38. *Id.* (citing *Allstate Ins. Co. v. Troelstrup*, 789 P.2d 415 (Colo. 1990)).

39. *Id.*

40. *Id.*

41. *Id.*

42. 530 N.E.2d 110 (Ind. Ct. App. 1988).

43. *Id.*

his insanity.⁴⁴ In this case, because Mr. Leming made no showing that his mental disorder was of such a level to have overcome his capacity to act rationally, his insanity defense was rejected, and coverage was again denied.⁴⁵

II. AUTOMOBILE LIABILITY INSURANCE CASES

A. Compulsory Insurance

During the survey period, there was one case that may prove to be a landmark decision in Indiana insurance law. The case of *Transamerica Insurance Co. v. Henry*⁴⁶ began in the federal court system.⁴⁷ Because the case involved a significant interpretation of Indiana law, the Seventh Circuit Court of Appeals certified the question to the Indiana Supreme Court for adjudication.⁴⁸

The factual background of the *Transamerica* case is not particularly important. The case basically involved the interpretation of what is commonly known as a "household exclusion" in an automobile liability policy. Generally speaking, a household exclusion denies liability coverage to an insured arising from claims for injury to a fellow member of the same household.⁴⁹ In this case, the household exclusion read as follows: "We do not provide liability coverage . . . for bodily injury to any person who is related by blood, marriage or adoption to you, if that person resides in your household at the time of the loss."⁵⁰

The legitimacy of the household exclusion had previously been passed upon by the Indiana Supreme Court in the seminal 1985 case of *Allstate Insurance Co. v. Boles*.⁵¹ In *Boles*, the Indiana Supreme Court held that Allstate's household exclusion was binding and that it did not contravene public policy.⁵² The decision at that time appeared to turn on the question of whether Indiana's financial responsibility statute was compulsory.⁵³

Since *Boles* was decided, the Indiana statutes dealing with financial responsibility have changed. Under the earlier statute,⁵⁴ a person was required to provide proof of financial responsibility only *after* an accident

44. *Id.* at 112.

45. *Wiseman v. Leming*, 574 N.E.2d 327, 329 (Ind. Ct. App. 1991).

46. 563 N.E.2d 1265 (Ind. 1990).

47. *See Transamerica Ins. Co. v. Henry*, 904 F.2d 133 (7th Cir. 1990).

48. *See Transamerica Ins. Co. v. Henry*, 904 F.2d 387 (7th Cir. 1990).

49. *Transamerica*, 563 N.E.2d at 1266.

50. *Id.*

51. 481 N.E.2d 1096 (Ind. 1985).

52. *Id.* at 1101.

53. *Id.*

54. IND. CODE § 9-2-1-4 (1981).

had occurred.⁵⁵ However, under the newer financial responsibility statute, a person is now required to provide proof of financial responsibility in order to register a vehicle.⁵⁶ Therefore, the Indiana Supreme Court held in *Transamerica* that the new form of the statute is compulsory in nature.⁵⁷ Because the statute was found to be compulsory, the court was then required to look at the question of whether the household exclusion was contrary to Indiana public policy.

In reviewing the issue, the court noted that the purpose of the current financial responsibility law is to protect automobile owners and their families, friends, and guests from injury or damage caused by *other* cars on the road.⁵⁸ The statute does not mandate that automobile owners protect themselves for damages caused by their own families, friends, and guests.⁵⁹ The court, therefore, again found the household exclusion to be a valid and enforceable exclusion.⁶⁰

The importance of this case is that it sets the stage for litigation in the future. There have been numerous automobile insurance cases that have been decided on the question of whether our financial responsibility laws are compulsory. Now that the Indiana Supreme Court has finally held that the financial responsibility statutes are compulsory, the door is again open for litigants to argue that conditions and exclusions within automobile liability policies are against public policy.

B. The Meaning of "In, Upon, Entering, or Alighting From" an Automobile

Over the last several years there has been a succession of cases dealing with the issue of whether a person is "in, upon, entering, or alighting from" a vehicle for purposes of automobile uninsured or underinsured motorist coverage.⁶¹ In *Auto-Owners Insurance Co. v. Powell*,⁶² the issue arose again. The case does not change or add much to Indiana law. It remains interesting, however, because it demonstrates in

55. *Transamerica Ins. Co. v. Henry*, 563 N.E.2d 1265, 1267 (Ind. 1990) (citing IND. CODE § 9-2-1-4 (1981)).

56. IND. CODE § 9-1-4-3.5 (1988).

57. *Transamerica*, 563 N.E.2d at 1268.

58. *Id.*

59. *Id.*

60. *Id.* at 1269.

61. See, e.g., *Miller v. Loman*, 518 N.E.2d 486 (Ind. Ct. App. 1987); *State Farm Mut. Auto. Ins. Co. v. Barton*, 509 N.E.2d 244 (Ind. Ct. App. 1987); *Michigan Mut. Ins. Co. v. Combs*, 446 N.E.2d 1001 (Ind. Ct. App. 1983); *United Farm Bureau Mut. Ins. Co. v. Pierce*, 283 N.E.2d 788 (Ind. Ct. App. 1972).

62. 757 F. Supp. 965 (S.D. Ind. 1991).

detail the factual analysis that a court must make in determining whether a person should be entitled to the benefits of insurance coverage on the vehicle.

In this particular case, Mr. Powell was operating his employer's van along Interstate I-465 in Indianapolis. Powell lost control of the van, struck a median wall, and ended up facing perpendicular to the highway with a portion of the van extending into the traveled portion of the interstate. Following the accident, Mr. Powell exited from the van to "walk off" momentary disorientation caused by the accident. Another motorist stopped on the other side of the interstate to help Powell, and at some point, Mr. Powell crossed the interstate to the other vehicle. Thereafter, Powell returned across the interstate to his van and was struck down when an uninsured vehicle collided with the van and forced the van into him. There was a dispute as to how long Mr. Powell was out of his van before the second accident occurred, but it was probably a period of two to five minutes.

To decide whether Mr. Powell was "in, upon, entering, or alighting from" the van for purposes of uninsured motorist coverage, the court relied on *Miller v. Loman*.⁶³ In *Miller*, the court indicated a four-step analysis that should be evaluated in determining whether a person has completed the act of "alighting from" a vehicle.⁶⁴ The factors are: (1) the physical distance between the disabled automobile and the injury-producing accident; (2) the time lapse between the exit from the automobile and the injury-producing accident, (3) the opportunity for the individual to reach a zone of safety; and (4) the individual's intention with relation to re-entering the automobile.⁶⁵ The *Powell* court applied these factors and found that Powell had completed all acts necessary to "alight from" the van and that Powell was thus not entitled to coverage under the uninsured motorist provision of the auto-owners policy.⁶⁶ The court's analysis in *Powell* demonstrates the utility of the four step analysis.⁶⁷ The analysis is extremely helpful in enabling attorneys, judges, and insurance companies to evaluate situations so that litigation can be avoided.

Late in the survey period, there was another case dealing with a similar issue. In *Monroe Guaranty Insurance Co. v. Campos*,⁶⁸ the Indiana Court of Appeals was called upon to decide whether a wrecker

63. 518 N.E.2d 486 (Ind. Ct. App. 1987).

64. Powell did not contend that he was "in or upon" the van. Thus, the issue that the court addressed was the subject of "alighting from."

65. *Miller*, 518 N.E.2d at 491.

66. *Powell*, 757 F. Supp. at 971-72.

67. *Miller*, 518 N.E.2d at 491.

68. 582 N.E.2d 865 (Ind. Ct. App. 1991).

driver was "using" his tow truck when he was struck and injured by an uninsured driver. In this case the driver, Mr. Campos, had been summoned in his company's tow truck to an intersection in Fort Wayne, Indiana, where police officers had stopped a semi-tractor/trailer driver under suspicion of driving while intoxicated. When Mr. Campos arrived, he was told to wait while the tractor/trailer driver was given a breathalyzer test. The officer invited Mr. Campos to wait in the back seat of the police officer's car.

While he was waiting, Mr. Campos returned briefly to his tow truck to answer a page. Thereafter, he learned from the officer that the tractor/trailer driver was going to be arrested and that it would be necessary for Campos to remove the tractor/trailer from the street. As Mr. Campos was exiting the police vehicle to inspect the tractor/trailer for purposes of hitching his tow, he was struck and badly injured by a vehicle operated by an uninsured motorist.

The controversy in this case arose from the question of whether the tow truck was being "used" by Mr. Campos at the time of the accident. Previously, in *Miller v. Loman*, the court held that the "use" of an automobile means "propelling or directing a vehicle to a place where it ceases to be employed."⁶⁹ An earlier Indiana Court of Appeals case, *American Family Mutual v. National Insurance*,⁷⁰ also held that the term "use" means to "drive" or "operate" a vehicle.⁷¹

Despite its earlier definitions of the term "use," the Indiana Court of Appeals in *Campos* found that it was necessary to study the nature of the use contemplated by the particular vehicle that was insured.⁷² Because the insured vehicle was a tow truck, the court observed that it was reasonable to expect that a tow truck driver would have to engage in activities other than simply *driving* the truck.⁷³ Those activities attendant to "using" the truck might include evaluating the scene, securing the disabled vehicle, attaching the tow equipment to the vehicle, and consulting with law enforcement officials concerning the situation.⁷⁴

Before reaching its conclusion, the court noted that other jurisdictions have grappled with the meaning of the word "use" in the context of garbage trucks, fire trucks, and tow trucks.⁷⁵ In each such instance, the

69. *Miller v. Loman*, 518 N.E.2d 486, 492 (Ind. Ct. App. 1987).

70. 577 N.E.2d 969 (Ind. Ct. App. 1991).

71. *Campos*, 582 N.E.2d at 870.

72. *Id.*

73. *Id.* at 971.

74. *Id.*

75. *Id.* (citing *Hartford Accident & Indem. Co. v. Booker*, 230 S.E.2d 70 (Ga. Ct. App. 1976)); *Stevens v. USF&G Co.*, 345 So. 2d 1041 (Miss. 1977); *Great Am. Ins. Co. v. Cassel*, 389 S.E.2d 476 (Va. 1990).

other jurisdictions acknowledged that it is sometimes necessary to do certain things outside of the vehicle when "using" it.⁷⁶ Thus, the court found in this instance that the "use" of a tow truck is more than just driving it, and the court held that Mr. Campos was "using" the tow truck when he was struck by the uninsured motorist.⁷⁷

Although this opinion would seem to extend coverage beyond the parameters previously contemplated by other Indiana cases, it is probably a well-reasoned opinion. Using the four measuring sticks provided by the *Miller v. Loman* case, there is no question that Mr. Campos was close in time and space to his departure from the tow truck. Furthermore, his intent was to re-enter the tow truck, and he had not reached a zone of safety when he was struck by the uninsured motorist. Thus, he was certainly "using" the tow truck insofar as the *Miller v. Loman* tests are concerned.

One additional case during the last year dealt with the meaning of the word "use." In *American Family Mutual Insurance Co. v. National Insurance Association*,⁷⁸ an individual by the name of Russell Isaac was involved in an automobile collision while driving a van that was owned by a Michael Brown. Mr. Isaac was a professional mechanic and had agreed to perform body repair on the van for Mr. Brown. The accident happened while Isaac was taking the van to a body shop to do the repair work.

As a result of the accident, the other driver was paid by his own uninsured motorist carrier, and the carrier, American Family, obtained a judgment against Isaac for more than \$24,000. Mr. Isaac did not have sufficient resources to satisfy the judgment, so American Family brought proceedings supplemental against National Insurance Association, the automobile liability carrier for Michael Brown's wife.

National moved for summary judgment on the basis that Mr. Isaac's operation of the van was excluded under a provision in the policy which excluded coverage if a vehicle was being "used" by any person "engaged in the automobile business." The term "automobile business" was defined as "the business or occupation of selling, repairing, servicing, storing, or parking automobiles."⁷⁹

The dispute in this case over the meaning of the word "use" was whether "use" meant "employing an item in one's own service," or whether it meant "to drive" or "operate." In this instance, the court held that the word "use" meant to *operate* the vehicle and that it was being operated by a person who was in the automobile business and

76. *Monroe Guar. Ins. Co. v. Campos*, 582 N.E.2d 865, 870 (Ind. Ct. App. 1991).

77. *Id.* at 871.

78. 577 N.E.2d 969 (Ind. Ct. App. 1991).

79. *Id.* at 971.

who was using it as a part of the effort to effectuate repairs.⁸⁰ Therefore, the court held that the personal automobile policy of Mrs. Brown excluded coverage for Mr. Isaac.⁸¹

Although the ruling in this case may make sense, it is not helpful to the general body of law dealing with the meaning of the word "use" in Indiana. Unfortunately, the definition of the word "use" has been changed from one case to another depending upon the context. It will continue to be difficult for lawyers and judges to be guided by this and other cases. The definition of "use" is probably an area in which we will continue to see litigation in the future.

III. MISCELLANEOUS CASES

A. Subrogation

In *Associated Insurance Co., Inc. v. Burns*,⁸² the Indiana Court of Appeals decided a matter of first impression with respect to Indiana subrogation law. In this case, William Burns was an employee of Cardinal Service Management, and in the course of his employment, Mr. Burns was injured on the job. When Mr. Burns made a workers' compensation claim, Cardinal's workers' compensation carrier, Commercial Union Insurance, denied that the injury occurred in the course of employment and refused payment. Mr. Burns was then required to submit his bills for medical and hospital expenses to his group health carrier, Associated.

Mr. Burns subsequently filed a complaint against Cardinal and its insurer before the Industrial Board to have a determination made on the question of whether his injuries were compensable under the Workers' Compensation Act. Associated then requested permission of the Board to intervene in the litigation to determine whether it should be entitled to subrogation for the health care benefits it had paid. The issue presented was whether intervention should be allowed.

In analyzing the situation, the Indiana Court of Appeals noted that the Workers' Compensation Act was designed to transfer the economic loss caused by an industrial accident from the employee to the employer.⁸³ In this instance, the court acknowledged that it was beneficial to the employee to be able to receive necessary treatment while awaiting an award of workers' compensation.⁸⁴ Because the Industrial Board had full authority by statute to determine all matters related to reimbursements

80. *Id.*

81. *Id.*

82. 562 N.E.2d 430 (Ind. Ct. App. 1990).

83. *Id.* (citing *Goins v. Lott*, 435 N.E.2d 1002, 1010 (Ind. Ct. App. 1982)).

84. *Burns*, 562 N.E.2d at 434.

for compensation, the court allowed Associated to intervene for reimbursement of the bills it had paid.⁸⁵

This is a sensible case because it was Commercial Union's decision to deny benefits that prompted payment by Associated. If Associated were not allowed some form of reimbursement, it would provide workers' compensation carriers a much greater incentive to deny benefits and later escape having to pay medical bills if the injury is adjudicated to have been work related.

B. Health Insurance — Are Medical Providers Third Party Beneficiaries?

In the case of *N N Investors Life Insurance Co., Inc. v. Crossley*,⁸⁶ the Indiana Court of Appeals dealt with the issue of whether a medical provider is a third party beneficiary to a medical insurance policy between an insurer and an insured. In this case, the court held that the medical provider was not a third party beneficiary.⁸⁷

The case arose from a policy providing medical insurance to one Lucille Crossley and her husband, Donald Lee Finch. Mrs. Crossley shot Mr. Finch and rendered him a quadriplegic. He subsequently received treatment at several health care facilities, including the Methodist Hospital of Gary, Indiana.

At some point in time after Mr. Finch was injured, N N Investors Life Insurance Company discovered that Mrs. Crossley had made material misrepresentations with respect to the medical information she provided on her insurance application. N N Investors, therefore, filed a lawsuit to rescind the policy, and it named Crossley, Finch, and the medical providers as defendants.

At the outset, the trial court granted a summary judgment for N N Investors on the issue of Mrs. Crossley's material misrepresentations and declared that the policy was voidable. The question then arose as to whether the medical providers who had provided medical services to Mr. Finch should be independently entitled to recover under the contract.⁸⁸

The first issue was whether Methodist Hospital could recover as an assignee of benefits. That issue was quickly dispatched based upon the general rule that an "assignee acquires no greater rights than the assignor."⁸⁹ Consequently, Methodist next argued that it should be entitled

85. *Id.*

86. 580 N.E.2d 307 (Ind. Ct. App. 1991).

87. *Id.* at 309.

88. *Id.*

89. *Id.*

to benefits as a third party beneficiary to the insurance contract.

In evaluating the law with respect to third party beneficiaries, the court considered the case of *Mogenson v. Martz*,⁹⁰ in which the Indiana Court of Appeals held:

Third-party beneficiaries may directly enforce a contract in Indiana. A third-party beneficiary contract requires first, that the intent to benefit the third party be clear, second, that the contract impose a duty on one of the contracting parties in favor of the third party, and third, that the performance of the terms necessarily render to the third party a direct benefit intended by the parties to the contract.⁹¹

In applying the requirements to the present case, the Indiana Court of Appeals held that Methodist was not a third party beneficiary.⁹² The court noted that the insurance contract stated that "all benefits are payable to the Insured Individual."⁹³ Thus, there was no apparent intent in the policy for Methodist to benefit directly from the insurance contract other than by assignment.⁹⁴

Finally, as the third party beneficiary issue was decided, the question next arose as to whether the insurance company should be estopped from providing coverage. Unfortunately, the court did not get the opportunity to address this issue because it was not properly before the court.⁹⁵

The court's analysis of the third party beneficiary portion of the policy will probably withstand further analysis under Indiana law. The only way that a health care provider may be able recover is under a theory of estoppel. If the health care provider can prove that it relied to its detriment upon the insurer's assurances of coverage *before* services were provided, then the provider may have a reasonable opportunity to force the insurer to pay the bills.

C. *Installment Contract Seller's Right of Payment*

During the last year, there was an extremely important case dealing with another issue of first impression in Indiana. In *Property Owners Insurance Co. v. Hack*,⁹⁶ the court was asked to address the relative

90. 441 N.E.2d 34 (Ind. Ct. App. 1982).

91. *Id.* at 35.

92. *Investors Life Ins. Co., Inc. v. Crossley*, 580 N.E.2d 307, 309 (Ind. Ct. App. 1991).

93. *Id.*

94. *Id.*

95. *Id.*

96. 559 N.E.2d 396 (Ind. Ct. App. 1990).

rights of persons interested in the proceeds of a fire insurance policy.

In this case, Mr. and Mrs. Hack owned a restaurant and tavern that had been mortgaged with a local bank. The Hacks subsequently sold the business along with all of its equipment and fixtures, including a retail liquor permit, to a Mr. Lacey. The sale was transacted pursuant to the provisions of an installment contract. Under the contract, Mr. Lacey was obligated to procure fire, casualty, and extended insurance coverage on the property for his benefit and for the benefit of the Hacks.

Some two years after the sale, the insurance carrier obtained by Mr. Lacey sent notice to the Hacks that Mr. Lacey had permitted the coverages to lapse by reason of his failure to pay premiums. After learning of the lapse, Mr. Hack contacted an insurance agent for Property Owners Insurance and explained the situation in detail. He told the agent that there were three interested parties in the real estate, namely, the original mortgage holder (the bank), the Hacks as contract sellers, and Mr. Lacey as the contract buyer. Taking the information from Mr. Hack, the insurance agent, through Property Owners, issued a policy which listed Lacey as the insured, and on a section of the policy entitled "Additional Interest Schedule," the Hacks were listed as "contract holders," and the bank was listed as a mortgagee under a standard mortgage clause.

Approximately a year later, the business was destroyed by a fire, and Mr. Lacey was convicted of arson. Following the fire, Property Owners paid the mortgage balance to the bank, but refused to pay the Hacks for any of their losses sustained beyond the mortgage balance. When Property Owners refused to pay the Hacks for their fixtures and loss of income, they filed a lawsuit.

The issue was discreetly identified by the Indiana Court of Appeals as follows:

The case is one of first impression, and calls on us to rule on the nature and extent of a real estate installment contract seller's interest in fire insurance proceeds. The specific issue before us is whether a contract seller that requests insurance from an insurance company is entitled to recover the value of its interests under the contract in the event of a loss, notwithstanding the insurer's payment of the seller's mortgage to the seller's mortgagee.⁹⁷

The court recognized that there were certain basic legal concepts in conflict in this case. In general, an individual who is listed as a "loss

97. *Id.* at 398.

payee" in an insurance policy does not have a direct contract with the insurer.⁹⁸ The loss payee's rights are considered to be derivative of the named insured's rights.⁹⁹ Thus, if the named insured commits an act such as arson that results in a denial of coverage, the loss payee loses his rights as well.¹⁰⁰

An exception to this rule is the New York Standard Mortgage Clause. Under a standard mortgage clause, courts have recognized that a mortgagee is entitled to direct contract rights against the insurer and is also entitled to direct payment *even if* the named insured committed an act that permits the policy to be avoided.¹⁰¹ In this case, Property Owners argued that the Hacks were no greater than mortgagees.¹⁰² Thus, Property Owners argued that it had satisfied its obligation by paying off the mortgage.¹⁰³

The court noted that contract sellers such as the Hacks can be protected in a policy by being named in what is called a "contract of sale clause."¹⁰⁴ Such a clause was not issued in this case even though the insurance agent had been given adequate information to enable him to realize that such a clause should be used.

Relying upon simple rules of contract interpretation, the court found that Mr. and Mrs. Hack should have been compensated for the losses that they sustained beyond the mortgage balance.¹⁰⁵ The court noted that it was the fault of the insurance agent and the company that a contract of sale clause had not been issued.¹⁰⁶ The court also stated that it was certainly the reasonable expectation of the Hacks that they would be covered for all of their losses when they were the ones that had procured the coverage.¹⁰⁷ Thus, the court refused to let the insurance company treat the Hacks as mortgagees in a manner that would have limited their coverage to the mortgage proceeds.

This case is worth reading because it contains a large number of citations to general principles of insurance contract interpretation in the real estate and mortgage context. It is an excellent example of the application of the "reasonable expectation of the insured" rule to avoid

98. *Id.* at 400.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 399.

103. *Id.*

104. *Id.* at 402-03.

105. *Id.* at 402.

106. *Id.*

107. *Id.*

an injustice that would be caused by literal interpretation of an insurance contract.

D. Are Punitive Damages Recoverable Under Underinsured Motorist Coverage?

Another recent case of first impression is *Shuamber v. Henderson*.¹⁰⁸ In this case, the court was asked to decide whether a person could recover punitive damages from her own underinsured motorist coverage for grievous injuries caused by a third party.

In *Shuamber*, a mother and daughter were injured in an automobile accident in which the mother's son was killed. The other driver had only \$50,000 in insurance coverage and that amount was tendered into the court. The plaintiffs, Gail and Katherine Shuamber, then pursued an underinsured motorist claim against their own carrier, American Employer's Insurance Company. As a part of their underinsured motorist claim, the Shuambers believed that they should have been entitled to punitive damages against the other driver.

In analyzing the situation, the court acknowledged that Indiana Code section 27-7-5-2(a) requires insurers to make underinsured motorist coverage available in the same amounts and subject to the same limits as the insured's liability policy.¹⁰⁹ The court noted that the purpose of underinsured motorist coverage is to put injured motorists in the same position they would have been in if the offending party had the same limits of insurance as the insured.¹¹⁰

The issue of whether punitive damages should be recovered from one's own underinsured motorist coverage had been addressed in other jurisdictions, and the Indiana Court of Appeals decided to follow the view that recovery should not be allowed.¹¹¹ Quoting the Supreme Court of Rhode Island, the court in *Shuamber* observed:

Those courts that have [denied recovery] emphasize that coverage would defeat the purpose of punitive damages, which is to punish and deter others from acting similarly; and allowing coverage serves no useful purpose since, supposedly, the plaintiff had been made whole by the award of compensatory damages. Again, to allow coverage, it has been said, passes on to the other premium payers, the punishment intended for the defendant and creates (1) a conflict of interest between the insurer and the

108. 563 N.E.2d 1314 (Ind. Ct. App. 1990).

109. IND. CODE § 27-7-5-2(a) (Supp. 1991).

110. *Shuamber*, 563 N.E.2d at 1317.

111. *Id.*

insured and (2) a conflict between the rule permitting the jury to consider a defendant's financial standing in fixing the amount of punitive damages and the principle that the insurance coverage would not be revealed to the jury.¹¹²

This is certainly a sound ruling. Because the purpose of the underinsured motorist statute is to provide *compensation* to a person who is involved in an accident with an underinsured driver, it would not make sense to allow recovery of damages that are not compensatory in nature.

IV. STATUTORY DEVELOPMENTS

Although there were numerous amendments to general insurance laws during the 1991 General Assembly, the one amendment of significance to general practitioners was to the Unfair Claim Settlement Practices Act.¹¹³ The new section of the Act is known as the "Auto Repair Claims Settlement" section. The statute applies to policies written or received after June.

Briefly summarized, this new section of the Act obligates an insurance carrier to offer an insured the opportunity to choose among new body parts, after-market parts, or used parts when repairing a damaged vehicle that is within the first six model years since the year the vehicle was introduced.¹¹⁴ Under the statutory amendments, the company must not only offer the insured the opportunity to choose, but the company must also allow the insured to indicate *in writing* which body parts the insured chooses.¹¹⁵ If an insurer fails to follow these steps, that failure is considered to be an unfair claim settlement practice¹¹⁶ and is subject to the penalties to be imposed by the Department of Insurance as set forth in separate parts of the Act.¹¹⁷

This new statute has caused a great deal of consternation and turmoil in the automobile insurance industry. Already insurers are raising numerous questions concerning the interpretation of the Act. A reading of the Act demonstrates that it is vague, ambiguous, and sometimes difficult to interpret. There is no question that attorneys representing insureds and insurers will remain busy as claims are administered under

112. *Id.* at 543 (quoting *Allen v. Simmons*, 533 A.2d 541 (R.I. 1987)).

113. IND. CODE § 27-4-1-4.5(1)-(16) (Supp. 1991).

114. *Id.* § 27-4-1.5-8(d).

115. *Id.* § 27-4-1.5-8(c).

116. *Id.* § 27-4-1.5-12(1).

117. *Id.* § 27-4-1-5.6(a)-(d).

the new statute. The statute applies to policies written or renewed after June 30, 1991.



Labor and Employment Law

BARBARA J. FICK*

The past year did not bring many major developments in the labor and employment law field; it was mainly a year of refinements and fine-tuning. The biggest news on the legislative front is the passage of a statute prohibiting employment discrimination based on an employee's off-duty use of tobacco.¹ In the judicial arena, the Indiana Supreme Court, in *Bochnowski v. Peoples Federal Savings & Loan Association*,² joined the majority trend in recognizing a cause of action for third party intentional interference with at-will employment relationships. These were the highlights of a relatively quiet year. Other legislative developments discussed below include amendments to education statutes regarding suspensions of teachers with and without pay, changes in payment provisions under the unemployment and workers' compensation laws, and amendments to the penalty provisions of the occupational health and safety law. Among the judicial decisions reviewed in this Article are cases revisiting the *Frampton* rule, addressing employee defamation suits against employers, employment discrimination, issues arising in public sector employment, wage statutes, unemployment compensation, and workers' compensation.

I. LEGISLATIVE DEVELOPMENTS

A. Off-Duty Use of Tobacco

A new chapter was added to Title 22 of the Indiana Code dealing with the off-duty use of tobacco by employees. Chapter 22-5-4 prohibits an employer from requiring, as a condition of employment, that an employee refrain from using tobacco products when not at work.³ This chapter also prohibits an employer from discriminating against an employee with respect to compensation, benefits, and terms and conditions of employment because an employee uses tobacco when not at work.⁴ This statute does not prohibit employers from maintaining smoke-free workplaces, limiting the work areas where smoking is allowed, or for-

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1. IND. CODE §§ 22-5-4-1 to -4 (Supp. 1991).

2. 571 N.E.2d 282 (Ind. 1991). See *infra* notes 29-35 and accompanying text.

3. IND. CODE § 22-5-4-1(1) (Supp. 1991).

4. *Id.* § 22-5-4-1(2).

bidding employees from smoking while at work. The law is aimed solely at off-duty conduct of employees.

Many employers, however, see a connection between some types of employee off-duty conduct and employer profitability. A new trend in health care cost containment among corporations is to offer financial incentives to employees who adopt and maintain healthy lifestyles.⁵ Many of these financial incentive plans focus on smoking. For example, Minneapolis-based Control Data Corporation charges its employees who smoke ten percent more for health insurance premiums than its non-smoking employees.⁶ Such a program would be illegal under the new Indiana law since it would constitute discrimination in benefits because an employee used tobacco products when not at work.

The new law allows employees to bring a civil action against employers to enforce its provisions.⁷ The statute authorizes courts to award actual damages, court costs, and attorney's fees to prevailing employees and to enjoin further violations of the statute.⁸ The remedies provided by this statute are not exclusive; employees retain any rights or remedies provided by any other state or federal laws.⁹ The statute exempts from its application employers that are a church, a religious organization, or a school or business conducted by a church or religious organization.¹⁰

B. Amendments to Indiana's Education Statutes

The legislature also amended a section of the Teacher Tenure Act dealing with the cancellation of a permanent or semi-permanent teacher's indefinite contract.¹¹ The statute provided that, pending a decision on the cancellation of a contract, a teacher could be suspended from duty, but it was silent as to whether that teacher was entitled to continue receiving a salary while suspended.¹² The amendment prohibits the governing body of the school corporation from withholding salary payments and other employment benefits during the period of suspension.¹³

A new section was added to the Indiana education code detailing the procedures for suspending a teacher *without pay* when the procedures

5. Laurie Cohen, *Wanted: Healthier Workers*, CHICAGO TRIBUNE, Jan. 6, 1992, § 4, at 1.

6. *Id.* at 2.

7. IND. CODE § 22-5-4-2(a) (Supp. 1991).

8. *Id.* § 22-5-4-2(b).

9. *Id.* § 22-5-4-3.

10. *Id.* § 22-5-4-4.

11. *Id.* § 20-6.1-4-11.

12. IND. CODE § 20-6.1-4-11(a)(8) (1988).

13. IND. CODE § 20-6.1-4-11(b) (Supp. 1991).

for canceling the contract do not apply.¹⁴ The statute lists five exclusive reasons for which a teacher may be suspended without pay.¹⁵ The reasons listed are broad enough, however, to encompass a multitude of situations. For example, a teacher may be suspended without pay for immorality or for good and just cause.¹⁶

This new section also provides due process procedures which must be followed to suspend a teacher without pay.¹⁷ The teacher must be notified in writing of the time, place, and date of the consideration by the school corporation of the suspension and must be furnished, upon request, a written statement of the reasons for the suspension.¹⁸ The teacher may file a written request for a hearing, where he is entitled to a full statement of the reasons for the suspension and is entitled to present testimony and evidence bearing on the reasons.¹⁹ The section also provides when such a suspension may take effect²⁰ and allows the governing body of the school corporation to suspend a teacher without pay "for a reasonable time."²¹ The section does not define, however, what is a reasonable time.

C. Other Legislative Developments

House Enrolled Act No. 1594 amends several sections of the unemployment compensation statute, primarily providing for changes in the fund ratio schedule and increasing the amount of claimant payments. A new section also was added authorizing the administrative law judges and review board to hold hearings by telephone under certain specified conditions.²²

House Enrolled Act No. 1517 contains numerous amendments to the workers' compensation law, the majority of which provide for increases in the payment schedules for injuries and occupational diseases. Additionally, two new provisions were added establishing time limits within which an employer must begin temporary total or partial disability payments or notify the workers' compensation board and the affected employee that it is denying liability.²³ These provisions also specify the

14. *Id.* § 20-6.1-5-15.

15. *Id.* § 20-6.1-5-15(b). Section 15(b) expressly provides that the five listed reasons are the only reasons for which a suspension without pay may occur.

16. IND. CODE § 20-6.1-5-15(b)(1), (5) (Supp. 1991).

17. *Id.* § 20-6.1-5-15(c).

18. *Id.* § 20-6.1-5-15(c)(1), (2).

19. *Id.* § 20-6.1-5-15(c)(3)-(6).

20. *Id.* § 20-6.1-5-15(c)(7).

21. *Id.* § 20-6.1-5-15(c)(8).

22. *Id.* § 22-4-17-8.5.

23. *Id.* § 22-3-3-7(b) (disabilities caused by injuries); *id.* § 22-3-7-16(a) (payments on account of occupational disease).

circumstances under which the employer may terminate such payments once begun.²⁴ Another section was added to the workers' compensation law requiring employers to post a notice at the workplace informing employees that they are covered by workers' compensation insurance and containing the name, address, and telephone number of the insurance carrier.²⁵

House Enrolled Act No. 1517 also amended the occupational health and safety law by increasing the amount of the penalty assessed for violations²⁶ and adding penalties for failure to comply with the posting requirements²⁷ and for knowing violations of any standard, rule, or order.²⁸

II. JUDICIAL DEVELOPMENTS

A. *Employment-at-Will*

In *Bochnowski v. Peoples Federal Savings & Loan Association*, the Indiana Supreme Court recognized, for the first time, the validity of a claim for tortious interference with an employment relationship when that relationship is based on a contract terminable at will.²⁹ Prior to *Bochnowski*, Indiana courts refused to recognize such a cause of action.³⁰ The courts had noted that to assert a successful claim for tortious interference, the underlying contract right subject to the interference must be enforceable. When the underlying contract is terminable at will, the contracting parties do not have enforceable rights as to the duration of the contract. The fact that third party interference caused the contract to be terminated, therefore, did not give rise to a cause of action because there was no enforceable expectation as to the date when the contract could be terminated.³¹

The Indiana Supreme Court, in rejecting this reasoning, joined the majority of states which have recognized a cause of action for tortious interference with an employment-at-will relationship.³² The court did not disagree with the proposition that in a tortious interference action the underlying contract right subject to interference must be enforceable.

24. *Id.* § 22-3-3-7(c) (payments on account of injuries); *id.* § 22-3-7-16(b) (payments on account of occupational disease).

25. *Id.* § 22-3-2-22.

26. *Id.* § 22-8-1.1-27.1(a).

27. *Id.* § 22-8-1.1-27.1(a)(4).

28. *Id.* § 22-8-1.1-27.1(a)(6).

29. *Bochnowski v. Peoples Fed. Savings & Loan Ass'n*, 571 N.E.2d 282 (Ind. 1991).

30. *See Stanley v. Kelley*, 422 N.E.2d 663 (Ind. Ct. App. 1981).

31. *Id.* at 667.

32. *Bochnowski*, 571 N.E.2d at 284.

Rather, the court viewed the right being interfered with by the third party in a slightly different light. First, it noted that "until a contract terminable at will is terminated, it constitutes a valid and subsisting agreement that is presumed to continue in effect."³³ Although not disputing the fact that the durational element of such a contract is unenforceable, the court observed that the right with which the third party is interfering is the *enforceable* expectation that the *decision* regarding duration will be made by the contracting parties and "not upon the whim of a third party interferer."³⁴ Thus, a claim for tortious interference with an at-will employment relationship can be maintained. In concluding, the court held that in order to be able to prevail on such a cause of action, the plaintiff must be able to prove "that the defendant interferer acted intentionally and without a legitimate business purpose."³⁵

The appellate court, in *Stivers v. Stevens*,³⁶ revisited the *Frampton* rule and expanded it to a closely related set of circumstances. In *Frampton v. Central Indiana Gas Co.*,³⁷ the Indiana Supreme Court recognized a public policy exception to the employment-at-will doctrine, allowing an employee to sue her employer for retaliatory discharge for filing a workers' compensation claim.³⁸ The court noted that refusing to recognize such a cause of action would allow employers to coerce their employees against asserting their rights under the workers' compensation law, thereby undermining the legislative purpose behind the law.³⁹

In *Stivers*, the employee alleged that she was discharged because she told her employer she intended to file a workers' compensation claim. The employer asserted that the holding of *Frampton* should be limited to its specific facts, arguing that the plaintiff's claim should be dismissed because she was not fired for filing a claim, but only because she said she would file a claim. The appellate court, rejecting the employer's contention, looked to the reasoning underlying the *Frampton* decision. Acknowledging that *Frampton* is a narrow exception to the employment-at-will rule, it noted that a reason for preventing employers from terminating employees who file workers' compensation claims is the "deleterious effect on the exercise of this important statutory right. The discharge of an employee merely for suggesting she might file a claim has an even stronger deleterious effect."⁴⁰

33. *Id.*

34. *Id.* at 285.

35. *Id.*

36. 581 N.E.2d 1253 (Ind. Ct. App. 1991).

37. 297 N.E.2d 425 (Ind. 1973).

38. *Id.* at 428.

39. *Id.*

40. *Stivers*, 581 N.E.2d at 1254.

The last two cases of interest in this area involve defamation suits brought by employees against their employers. In *Burks v. Rushmore*,⁴¹ the company medical director sent a memorandum to the secretary of the company benefit committee, the assistant vice president of personnel, and a company attorney involved in labor matters. The memorandum questioned whether the plaintiff-employee had engaged in fraud because he appeared to be actively managing a business while on disability leave from the company.

The appellate court affirmed the grant of summary judgment dismissing the complaint, finding that no publication had occurred.⁴² The plaintiff contended that since the company attorney had no responsibility to act on the content of the memorandum, there was publication as to him. The attorney had stated that he would not have acted on the memorandum without talking to somebody about it first. The court noted, however, that the company medical director had consulted in the past with the attorney on different matters and that after sending the memorandum, had consulted with the attorney concerning the plaintiff.⁴³ The court held that these facts showed that the attorney had some managerial responsibility to act upon the matter and thus, was an appropriate party to receive the memorandum.⁴⁴ No publication, therefore, had occurred.

The court also held that, even if there had been publication as to the attorney, the relationship between the medical director and the attorney met the requirements for a qualified privilege.⁴⁵ Because the attorney had a responsibility to act upon the information provided when consulted and the medical director had a duty to monitor the plaintiff's disability, the memorandum concerned their corresponding duties on an employment matter, was used for a proper purpose, and was sent to persons who had legitimate reasons to receive it. Thus, the communication was protected by a qualified privilege.⁴⁶

*Chambers v. American Trans Air, Inc.*⁴⁷ also concerned the scope of the qualified privilege in the employment context. Chambers, who had previously been employed by defendant American Trans Air, became concerned that her ex-employer was giving bad references to prospective employers, interfering with her ability to procure employment. She asked her mother and boyfriend to telephone the defendant, ostensibly as

41. 569 N.E.2d 714 (Ind. Ct. App. 1991).

42. *Id.* at 716.

43. *Id.* at 715.

44. *Id.* at 716.

45. *Id.* at 717.

46. *Id.* at 716-17.

47. 577 N.E.2d 612 (Ind. Ct. App. 1991).

prospective employers, and request a reference. Chambers alleged that the statements made by the defendant during these telephone conversations were defamatory. The trial court granted summary judgment for the defendant, holding that there had been no publication because the mother and boyfriend were acting as agents of the plaintiff.

The appellate court affirmed the grant of summary judgment, but on a different rationale. It considered whether the statements were protected by a qualified privilege.⁴⁸ The court cited Prosser & Keeton, *Torts*,⁴⁹ for the general rule that "an employee reference given by a former employer to a prospective employer is clothed with the mantle of qualified privilege."⁵⁰ The court adopted this general rule as consistent with existing Indiana law on the applicability of qualified privilege in other circumstances and as serving a significant social interest in unrestricted communication on a matter in which the parties have a common interest — the appraisal of an employee's qualifications for employment.⁵¹

Having recognized the qualified privilege for employment references, the court also specified that the communication could lose its privilege upon a showing of abuse.⁵² Such a showing could be made when: "(1) [t]he communicator was primarily motivated by ill will in making the statement; (2) there was excessive publication of the defamatory statement; or (3) the statement is made without belief or grounds for belief in its truth."⁵³

B. Employment Discrimination

*Indiana Civil Rights Commission v. Kightlinger & Gray*⁵⁴ clarified the scope of the term "employment" as used in the Indiana Civil Rights Law, which prohibits certain types of discrimination "relating to employment."⁵⁵ A senior partner in a law firm was expelled from the firm, allegedly due to his history of alcoholism. The attorney filed a complaint with the Indiana Civil Rights Commission claiming handicap discrimination in employment. The firm filed a motion to dismiss the complaint, contending that a partner is not an employee and that discrimination against a partner is not discrimination relating to employment. The Commission denied the motion.

48. *Id.* at 615.

49. W. PAGE KEETON, PROSSER & KEETON ON THE LAW OF TORTS, § 115, at 827 (5th ed. 1984).

50. *Chambers*, 577 N.E.2d at 615.

51. *Id.* at 615-16.

52. *Id.* at 615.

53. *Id.* at 616.

54. 567 N.E.2d 125 (Ind. Ct. App. 1991).

55. IND. CODE § 22-9-1-3(l) (1988).

Subsequently, the firm filed a petition for judicial review and a complaint for declaratory judgment with the superior court. The court granted both summary and declaratory judgment, holding that the Commission did not have jurisdiction over the complaint because a partnership relationship does not fall within the meaning of the statutory phrase "relating to employment." The appellate court affirmed.⁵⁶

The appellate court noted that although the Indiana Civil Rights Law does not define the term "employment," it does define the terms "employer" and "employee" and the term employment must be considered within the context of those definitions.⁵⁷ Although the law firm in this case satisfied the definition of employer because it employed six or more persons, the complainant attorney was not an employee because he did not receive wages or salary as required by the statutory definition; he received a portion of the profits.⁵⁸

The relationship among partners in a law firm is not that of employer and employee. Rather, the parties have equal status among themselves; a partnership is an arrangement among equals.⁵⁹ The court cited to the Supreme Court's discussion in *Hishon v. King Spalding*⁶⁰ regarding partnership status within the context of Title VII of the Civil Rights Act of 1964. Noting that the decision was not binding on the court in its interpretation of Indiana law, the court found the analysis in Justice Powell's concurring opinion helpful: "The relationship among law partners differs markedly from that between employer and employee. . . . The judgmental and sensitive decisions that must be made among the partners embrace a wide range of subjects. The essence of the law partnership is the common conduct of a shared enterprise."⁶¹

C. Public Sector Employment

In *Indiana State Prison v. Van Ulzen*⁶² the Indiana Supreme Court interpreted a provision in the State Personnel Act⁶³ governing demotions of state employees. The provision states that any change of an employee from a position in one class to a position in a lower ranking class is

56. *Kightlinger & Gray*, 567 N.E.2d at 130.

57. *Id.* at 129.

58. *Id.*

59. *Id.*

60. 467 U.S. 69 (1984).

61. *Indiana Civil Rights Comm'n v. Kightlinger & Gray*, 567 N.E.2d 125, 130 (Ind. Ct. App. 1991) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 80 (1984) (Powell, J., concurring)).

62. 582 N.E.2d 789 (Ind. 1991).

63. IND. CODE §§ 4-15-2-1 to -43 (1988 & Supp. 1991).

a demotion and can be made only in accordance with prescribed procedures.⁶⁴

The appellee, Van Ulzen, was a teacher at the Indiana State Prison. On occasions when prison authorities instituted lockdowns, during which no classes were held, Van Ulzen was temporarily reassigned to perform certain correctional officer duties. Van Ulzen argued that this reassignment constituted a demotion because a correctional officer's job is of a lower rank than a teacher and that the demotion violated state law because it was accomplished without following the prescribed statutory procedures.

Although Van Ulzen lost before the State Employees Appeals Commission, both the circuit and appellate courts endorsed his argument. On transfer to the Indiana Supreme Court, however, the court looked beyond the narrow confines of section 24 of the State Personnel Act governing demotions. The court began its analysis by noting that, with limited exceptions, no one has a right to continued public employment.⁶⁵ It then cited to that section of the State Personnel Act which allows the employer to layoff employees for lack of work.⁶⁶ Accordingly, the warden could have laid off Van Ulzen during the lockdown because there was no teaching work; the fact that Van Ulzen was temporarily reassigned instead did not mean he was demoted.⁶⁷ Although acknowledging that the language of section 24 states that "any change" in position to a lower-ranking class constitutes a demotion, the court concluded that the legislature could not have intended to create a system so inflexible as to preclude such temporary reassignments.⁶⁸

The court supported its conclusion by referring to section 34 of the Personnel Act which sets forth the procedures which must be followed before demoting an employee.⁶⁹ The same section governs procedures for dismissal. The court found that in requiring these procedural protections, the legislature had in mind changes in employment of a permanent nature—dismissals and demotions.⁷⁰ The concept of demotion connotes a permanent change for disciplinary purposes accompanied by a cut in pay. Van Ulzen's reassignment was temporary, due to emergency situations, and did not entail a reduction in pay.⁷¹ Van Ulzen's temporary reassignment, therefore, did not come within the purview of section 24

64. IND. CODE § 4-15-2-24 (1988).

65. *Van Ulen*, 582 N.E.2d at 791.

66. *Id.* (citing IND. CODE ANN. § 4-15-2-32(a) (1988)).

67. *Id.* at 792.

68. *Id.* at 791.

69. *Id.* at 791 n.3 (citing IND. CODE ANN. § 4-15-2-34 (West Supp. 1991)).

70. *Id.* at 791.

71. *Id.* at 791-92.

dealing with demotions, and the prison acted lawfully. The court added, "We are hard-pressed to imagine a situation where a modicum of flexibility is more in order."⁷²

In another case dealing with state employees, the appellate court interpreted Indiana Code chapter 4-15-3 dealing with the employment of engineers by the state. In *May v. Department of Natural Resources*,⁷³ May claimed that the Department of Natural Resources (DNR) lacked the authority to demote him because DNR had failed to promulgate rules and regulations concerning the employment of engineers as required by Indiana Code sections 4-15-3-3 and 4-15-3-5. DNR responded that these provisions are discretionary, not mandatory.

The court agreed with DNR. It noted that section 4-15-3-3 empowers a department to promulgate rules "as it may deem proper."⁷⁴ This language clearly indicates that such promulgation is within DNR's discretion.⁷⁵ Section 4-15-3-5, however, states that each department "shall cause to be prepared the rules and regulations."⁷⁶ Although the use of the word "shall" is generally construed as mandatory, the context or purpose of the statute may suggest a different meaning.⁷⁷

The court detailed circumstances in which the use of "shall" is held to be directory and found that those circumstances applied to this statute. First, the statute does not specify adverse consequences for failure to promulgate the rules.⁷⁸ Second, the promulgation of rules is not the essence of this statute.⁷⁹ Rather, the essence of this statute is that employment decisions regarding engineers be based on merit. Last, a mandatory construction of "shall" in section 4-15-3-5 obviously conflicts with the clearly discretionary provisions of section 4-15-3-3, and statutes regarding the same subject matter are to be construed *in pari materia*.⁸⁰

Two other significant cases in the public sector employment area dealt with questions arising under the Certificated Educational Employee Bargaining Act (CEEBA).⁸¹ In *Michigan City Education Association v. Board of School Trustees*,⁸² the court held that a teacher discharge grievance cannot be subject to binding arbitration pursuant to a collective

72. *Id.* at 792.

73. 565 N.E.2d 367 (Ind. Ct. App. 1991).

74. *Id.* at 370.

75. *Id.* at 371.

76. IND. CODE § 4-15-3-5 (1988).

77. *May*, 565 N.E.2d at 371.

78. *Id.*

79. *Id.*

80. *Id.*

81. IND. CODE §§ 20-7.5-1-1 to -14 (1988 & Supp. 1991).

82. 577 N.E.2d 1004 (Ind. Ct. App. 1991).

bargaining agreement between a school board and teachers' association.⁸³ CEEBA places limits on the scope of collective bargaining between the parties. Specifically, section 20-7.5-1-3 provides that a collective bargaining agreement cannot contain provisions in conflict with the school employer's authority to discharge employees.⁸⁴ The responsibility regarding teacher dismissal was entrusted by the legislature solely to the discretion of the school employer. The authority to decide this issue cannot be delegated to an arbitrator.⁸⁵ The court noted that the employer could contractually bind itself to follow specified criteria and procedures relative to a dismissal decision, but that the decision itself could not be contracted away.⁸⁶

In *Coons v. Kaiser*,⁸⁷ a student sued schoolteachers who went on strike, alleging that she had suffered educational deprivation and emotional distress as a result of the teachers' illegal actions. The court ruled that the plaintiff lacked standing to enforce CEEBA's provisions prohibiting teacher strikes and that there was no common-law right of action to recover damages for such a strike.⁸⁸

Section 20-7.5-1-14 of CEEBA not only prohibits strikes, but also expressly provides who may bring an action to enforce the prohibition and specifies the penalty imposed upon violators.⁸⁹ Only a school corporation or school employer is authorized to file suit for redress of an illegal strike. Relying upon the general principle of statutory construction that when a statute expressly provides a particular remedy the courts should not expand its coverage, the court concluded that a private cause of action could not be inferred.⁹⁰

The court distinguished *Boyle v. Anderson Fire Fighters Association Local 1262*,⁹¹ in which the court allowed private parties to maintain a cause of action for damages caused by fire during a firefighters' strike.⁹² The determinative factor in *Boyle* was the absence of a comprehensive statute regulating strikes by firefighters.⁹³ The legislature has, however, acted with regard to teacher strikes and specified enforcement procedures.

The plaintiff in *Coons* also argued that the teachers had committed a common-law tort entitling her to common-law remedies. The court disagreed, holding that a claim of educational deprivation is not an

83. *Id.* at 1008.

84. IND. CODE § 20-7.5-1-3 (1988).

85. *Michigan City Educ. Ass'n*, 577 N.E.2d at 1006-07.

86. *Id.* at 1008.

87. 567 N.E.2d 851 (Ind. Ct. App. 1991).

88. *Id.* at 852-55.

89. IND. CODE § 20-7.5-1-14 (1988).

90. *Coons*, 567 N.E.2d at 852.

91. 497 N.E.2d 1073 (Ind. Ct. App. 1986).

92. *Id.* at 1083.

93. *Coons v. Kaiser*, 567 N.E.2d 851, 853 (Ind. Ct. App. 1991).

established tort and should not be recognized independent of legislation.⁹⁴

D. Wage Statutes

In *Osler Institute, Inc. v. Inglert*,⁹⁵ the Indiana Supreme Court determined the circumstances under which an employee qualifies for liquidated damages when the employer violates the Indiana wage payment statute.⁹⁶ Employee Inglert was terminated from employment by the Osler Institute, but the employer failed to pay her overtime and vacation pay within the period of time required by the wage payment statute. The employer argued that it was not liable for liquidated damages because Inglert had not requested the overtime and vacation pay prior to or concurrent with her employment as required by the statute and that the application of the penalty provision was dependant on such a request. The appellate court rejected the employer's contention, holding that because the employee had been terminated, it was not necessary for her to demand, during her employment, payment of wages due as of her termination. The court noted that the statute has three distinct requirements regarding wage payments, violation of any one of which subjects the employer to the penalty provisions. One of the requirements is that employees, upon termination of employment, are to be paid at the next regular pay period. The court found that a demand for such payment is not a prerequisite under this provision. Moreover, to hold otherwise would allow employers to terminate employees, refuse payment of wages due, and avoid the application of a penalty.

The Indiana Supreme Court affirmed the decision of the appellate court awarding liquidated damages and attorney's fees.⁹⁷ It expressly agreed with the rationale of the appellate court and noted that the court's interpretation was consistent with Indiana Code section 22-2-9-2, which provides that upon discharge of an employee, wages are due at the next regular pay period.⁹⁸ Additionally, to the extent that the court in *City of Hammond v. Conley*⁹⁹ held that a request was a prerequisite for the penalty provision, it was overruled.¹⁰⁰

94. *Id.* at 854.

95. 569 N.E.2d 636 (Ind. 1991) (per curiam).

96. Indiana Code § 22-2-5-1(a) requires that employers pay employees at least semi-monthly or bi-weekly, if requested. Indiana Code § 22-2-5-2 provides that if an employer fails to make payments as required by section 1, the employer is liable for liquidated damages and attorney's fees.

97. *Osler*, 569 N.E.2d at 637.

98. *Id.*

99. 498 N.E.2d 48 (Ind. Ct. App. 1986).

100. *Osler Inst., Inc. v. Inglert*, 569 N.E.2d 636, 637 (Ind. 1991) (per curiam).

In *Stampco Construction Co. v. Guffey*,¹⁰¹ the court dealt with several issues concerning the enforcement and application of both the Indiana and federal prevailing wage statutes.¹⁰² The initial issue presented was whether the statutes allow private causes of action. Neither statute expressly authorizes private enforcement; thus, the question was whether a private cause of action could be implied. Although noting that the federal courts of appeals for the Third and Fifth Circuits had answered that question in the negative, the *Stampco* court elected to follow the Seventh Circuit's decision in *McDaniel v. University of Chicago*,¹⁰³ which found an implied private cause of action.¹⁰⁴ The court, relying upon *McDaniel*, held that a private cause of action exists under the federal statute and adopted the *McDaniel* analysis to find that the Indiana statute also implies a private cause of action.¹⁰⁵

The *McDaniel* court's analysis was based on an examination of the factors proposed by the Supreme Court in *Cort v. Ash*¹⁰⁶ for determining whether a federal statute implies a private action. The key element of the analysis in *McDaniel* was the decision that individual employees are members of the class for whose special benefit the Davis Bacon statute was enacted.¹⁰⁷

A cogent dissent by Judge Buchanan to the court's holding in *Stampco* pointed out that the validity of the Seventh Circuit's analysis in *McDaniel* had been undercut by subsequent Supreme Court cases clarifying the factors for implying a private cause of action.¹⁰⁸ Judge Buchanan cited *Cannon v. University of Chicago*,¹⁰⁹ in which the Court held that, in answering the question whether the plaintiff belonged to the class of individuals for whose benefit the statute was passed, the courts should look to the language of the statute.¹¹⁰ Judge Buchanan also pointed to *Universities Research Association, Inc. v. Coutu*,¹¹¹ in which the Court used the *Cannon* analysis in deciding whether an employee has a private cause of action under Davis Bacon when the underlying contract does not contain a prevailing wage clause. Although

101. 572 N.E.2d 510 (Ind. Ct. App. 1991).

102. See 40 U.S.C. § 2762 (1988); IND. CODE §§ 5-16-7-1 to -5 (1988 & Supp. 1991). Both statutes require, *inter alia*, the payment of prevailing wages to employees on public works projects.

103. 548 F.2d 689 (7th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978).

104. *Stampco*, 572 N.E.2d at 512.

105. *Id.* at 512-13.

106. 422 U.S. 66 (1975).

107. See *Stampco Constr. Co. v. Guffey*, 572 N.E.2d 510, 512 (Ind. Ct. App. 1991).

108. *Id.* at 514-15 (Buchanan, J., dissenting).

109. 441 U.S. 677 (1979).

110. *Id.* at 689.

111. 450 U.S. 754 (1981).

noting that employees are the focus of the statute for whose benefit prevailing wages are required, the Court found that the language of the statute is directed to federal agencies, requiring them to place wage clauses in federal construction contracts.¹¹² Therefore, the language of Davis Bacon was not found to support a private cause of action under the circumstances presented.¹¹³

Judge Buchanan noted in his dissent that the *Coutu* Court limited its holding to the facts of the case and did not reach the broader question of whether Davis Bacon creates an implied right of action in any case.¹¹⁴ However, using the *Cannon* and *Coutu* analysis, Judge Buchanan found that the language of Davis Bacon does not imply a private cause of action.¹¹⁵ The *Stampco* majority responded to Judge Buchanan's concerns by stating that the court in *Coutu* "expressly refused to decide whether the act created an implied private right of action to enforce a contract that contained specific Davis Bacon stipulations."¹¹⁶

Having found that the *McDaniel* analysis was no longer viable, Judge Buchanan refused to rely upon it in determining whether the Indiana prevailing wage statute created a private cause of action. Using the *Coutu* analysis, Buchanan noted that the Indiana statute directs government agencies to require contractors to pay the prevailing wage; thus, the language does not indicate an intent to create a private cause of action.¹¹⁷ Judge Buchanan found support for his conclusion in the fact that the Indiana statute provides criminal penalties for its violation, alluding to the discussion in *Cort* suggesting that the existence of criminal penalties is an indication that the legislature did not intend civil enforcement.¹¹⁸

The second issue the *Stampco* court confronted concerned the validity of waivers signed by employees agreeing to wages lower than those required by the prevailing wage statutes.¹¹⁹ The court noted the public interest in not unnecessarily restricting freedom of contract, but emphasized that the prevailing wage statutes embody a public interest in protecting employees from substandard wages.¹²⁰ The court relied on the general rule that contracts violative of statutory rights are presumed void, as well as on a finding that such a contract waiver would also

112. *Id.* at 770.

113. *Id.* at 772-73.

114. *Stampco Constr. Co. v. Guffey*, 572 N.E.2d 510, 515 (Ind. Ct. App. 1991) (Buchanan, J., dissenting).

115. *Id.* at 516 (Buchanan, J., dissenting).

116. *Id.* at 512 n.4.

117. *Id.* at 516 (Buchanan, J., dissenting).

118. *Id.*

119. *Id.* at 513.

120. *Id.*

violate public policy. Accordingly, the waivers were void and unenforceable.¹²¹

The court also found that because employees cannot waive their right to prevailing wages, a release signed by an employee for any unpaid wages is likewise void.¹²² On this latter point, Judge Buchanan again dissented. While agreeing that employees cannot waive their right to receive prevailing wages, he considered a release signed after employment had been terminated and a cause of action had accrued as involving a substantially different circumstance.¹²³ The judge found no public policy against the settlement of claims and viewed a release in return for some consideration as a legitimate surrender of a right to pursue a cause of action.¹²⁴

E. Unemployment Compensation

Several 1991 cases involved procedural issues arising in unemployment compensation cases, while one case resolved a constitutional challenge to a provision in the unemployment compensation statute.

In *Stoner v. Review Board*,¹²⁵ the Indiana Supreme Court considered the scope of review of a Review Board decision. An employee was discharged for using abusive language in referring to another employee. The Board denied the employee's claim, finding just cause for discharge based on the language used and on the fact that the employee failed to use the proper channels in dealing with the problem which had provoked his use of abusive language. The court of appeals reversed the Board's decision because it was based in part on a reason, failure to use proper channels, which was not the stated grounds for discharge.

The supreme court disagreed, holding that so long as the Board's decision was sustainable on any theory it could not be set aside.¹²⁶ The Board found abusive language had been used and relied upon that fact in making its decision. The fact that the Board also made extraneous conclusions did not invalidate the decision.¹²⁷ As Justice DeBruler pointed out in his dissent, however, one cannot tell if the Board's finding that the employee failed to use proper channels was extraneous because the Board relied on that finding, as well as the abusive language, to deny benefits.¹²⁸ It was unclear whether use of abusive language alone would

121. *Id.*

122. *Id.*

123. *Id.* at 517 (Buchanan, J., dissenting).

124. *Id.* at 516-17.

125. 571 N.E.2d 296 (Ind. 1991).

126. *Id.* at 297.

127. *Id.*

128. *Id.* at 298 (DeBruler, J., dissenting).

have been sufficient to deny benefits and thus, Justice DeBruler would have remanded the case to the Board to decide that issue.¹²⁹

In *Watterson v. Review Board*,¹³⁰ the court held that the 1990 decision in *Blackwell v. Review Board*¹³¹ could be applied retroactively.¹³² *Blackwell* addressed the type of proof necessary to support a finding that an employer rule is reasonable and uniformly enforced as a prerequisite to finding just cause when the employee violates such a rule. The *Blackwell* court held that, absent stipulation, the employer's rule must be reduced to writing and introduced in evidence in order for the employer to satisfy its evidentiary burden.¹³³ Oral testimony regarding the rule is insufficient.¹³⁴ The *Watterson* court found that this requirement did not change the law, but merely clarified what type of evidence is sufficient to satisfy the employer's burden.¹³⁵ Therefore, it could be applied retroactively.

*Best Lock Corp. v. Review Board*¹³⁶ also involved the evidentiary standard of proof regarding the reasonableness of an employer rule, violation of which is sufficient to constitute just cause. The employer rule in question prohibited the off-duty use of tobacco and alcohol. The employee was discharged for drinking alcohol on his own time. The employer introduced the written rule into evidence¹³⁷ and proved that it had been uniformly enforced. The point of contention was whether such a rule was reasonable.

The court held that the burden was on the employer to establish the reasonableness of its rule.¹³⁸ When a rule regulates off-duty conduct, the employer must show that the activity sought to be regulated bears some reasonable relationship to an employer business interest.¹³⁹ The court cited a Wisconsin case, *Gregory v. Anderson*,¹⁴⁰ as an example of when an employer made such a showing. In *Gregory*, the employer's business involved selling and servicing vending machines located in taverns. The employer had difficulty obtaining insurance for his drivers, but the existence of a rule prohibiting all use of alcohol by his drivers played a decisive factor in obtaining coverage. The employer's rule,

129. *Id.*

130. 568 N.E.2d 1102 (Ind. Ct. App. 1991).

131. 560 N.E.2d 674 (Ind. Ct. App. 1990).

132. *Watterson*, 568 N.E.2d at 1105.

133. *Blackwell*, 560 N.E.2d at 679.

134. *Id.*

135. *Watterson v. Review Bd.*, 568 N.E.2d 1102, 1105 (Ind. Ct. App. 1991).

136. 572 N.E.2d 520 (Ind. Ct. App. 1991).

137. The employer thereby satisfied the *Blackwell* requirement.

138. *Best Lock*, 572 N.E.2d at 527.

139. *Id.* at 525.

140. 109 N.W.2d 675 (Wis. 1961).

therefore, was found to be reasonable.¹⁴¹ In the instant case, however, Best Lock failed to produce competent evidence to show any relationship between the rule and its business interests; therefore, its rule was unreasonable, and violation of the rule did not constitute just cause for purposes of denying unemployment benefits.¹⁴²

In *Vicari v. Review Board*,¹⁴³ the claimant alleged that the unemployment compensation statute violated the equal protection guarantee in the Constitution because it treated claimants who had changed jobs within ten weeks differently than claimants who had not changed jobs within ten weeks. Indiana Code section 22-4-15-1(c)(1) provides that if an employee voluntarily leaves employment to accept a better job, she will not be disqualified from receiving benefits if terminated from the second job after a minimum of ten weeks of employment.¹⁴⁴ The court found no equal protection violation because the ten week rule was rationally related to a legitimate government objective—it prevents excessive job hopping and encourages employment stability.¹⁴⁵

F. Workers' Compensation

The court in *Artz v. Board of Commissioners*¹⁴⁶ was asked to decide if the workers' compensation law applies to county police officers. The court determined that the officers are not excluded from coverage.¹⁴⁷ The county argued that Indiana Code section 22-3-2-2(c)(1), which excludes municipal corporation police officers who are members of a pension fund, was intended to exclude any police officer who is eligible for a death benefit under a pension plan. The court rejected this argument, noting that if the legislature's intent had been to prevent multiple coverage it could have drafted the provision to say so.¹⁴⁸ Secondly, the language of the statute specifically uses the terms "common council" and "city," indicating an intent to limit the exclusion to cities.¹⁴⁹ Lastly, the legislature could not have intended to exclude county police officers because when this section of the law was passed county police forces did not exist.¹⁵⁰

141. *Best Lock Corp. v. Review Bd.*, 572 N.E.2d 520, 524 (Ind. Ct. App. 1991) (citing *Gregory v. Anderson*, 109 N.W.2d 675 (Wis. 1961)).

142. *Id.* at 527.

143. 568 N.E.2d 1061 (Ind. Ct. App. 1991).

144. IND. CODE § 22-4-15-1(c)(1) (Supp. 1991).

145. *Vicari*, 568 N.E.2d at 1063.

146. 566 N.E.2d 1105 (Ind. Ct. App. 1991).

147. *Id.* at 1106.

148. *Id.*

149. *Id.*

150. *Id.*

*Union City Body Co. v. Lambdin*¹⁵¹ involved determining the "date of occurrence" under the *Evans* rule for purposes of deciding when the statute of limitations for filing a claim begins to run. The Indiana Supreme Court, in *Evans v. Yankeetown Dock Corp.*,¹⁵² held that a compensable accident does not require a specific identifiable event, but could be the result of the usual exertion or exposure of an employee's job.¹⁵³ In *Lambdin*, the employee gradually became permanently disabled as a result of the bending and lifting he performed on the job over a period of years. Although the injury was compensable under *Evans*, the employer argued that the claim was barred by the statute of limitations because some of the events causing the injury occurred more than two years before the claim was filed. The court rejected the argument. It acknowledged that the limitations period begins to run from the date of the occurrence, but noted that in an *Evans*-type case, the occurrence is a continuing one.¹⁵⁴ When a continuing wrong exists, the statute of limitations begins to run when permanence of the wrong is discernible.¹⁵⁵

*Tarr v. Jablonski*¹⁵⁶ dealt with the exclusivity provision of the workers' compensation statute. An employee experienced chest pains while at work. Paramedics from the company medical department administered emergency medical care, but the employee died of cardiac arrest. The employee's survivors instituted a civil action for wrongful death against the paramedics. The court found the cause of action barred by the exclusivity provision of the workers' compensation statute.¹⁵⁷

The court initially noted the general rule that an individual covered by workers' compensation cannot maintain a civil action against co-employees for injuries arising out of employment.¹⁵⁸ The survivors argued for an exception to the rule based on *Ross v. Schubert*,¹⁵⁹ in which the court allowed an employee to sue a physician for malpractice even though the physician was employed by their common employer at the plant clinic. The court in *Tarr* refused to extend the *Ross* exception to paramedics for three reasons. First, *Ross* relied substantially on a case holding that a corporation cannot be held liable for physician malpractice, which holding is no longer viable. Second, the court cited *Rodgers v. Hembd*,¹⁶⁰

151. 569 N.E.2d 373 (Ind. Ct. App. 1991).

152. 491 N.E.2d 969 (Ind. 1986).

153. *Id.* at 973.

154. *Union City*, 569 N.E.2d at 374.

155. *Id.*

156. 569 N.E.2d 378 (Ind. Ct. App. 1991).

157. *Id.* at 379-80.

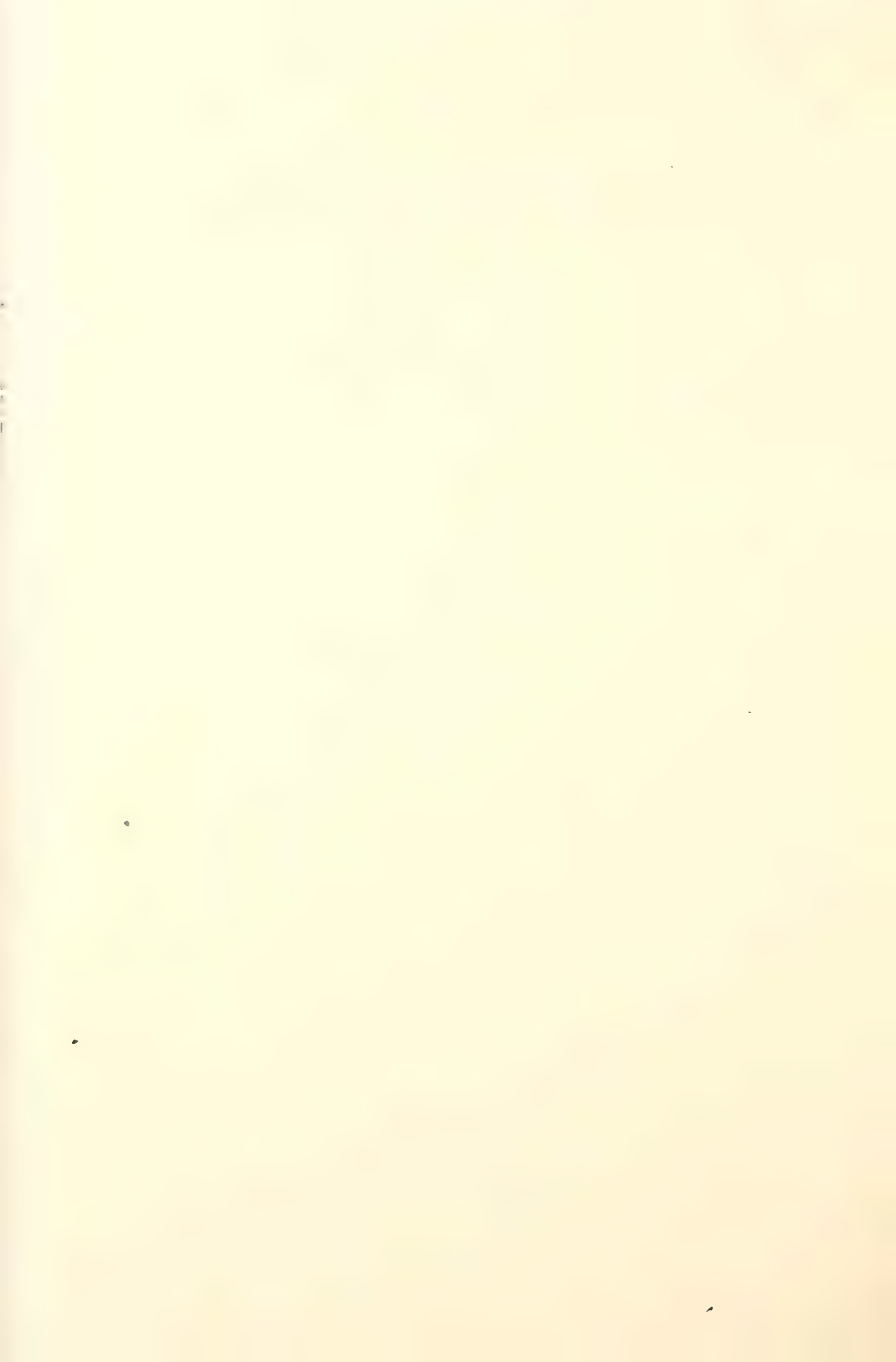
158. *Id.* at 379.

159. 388 N.E.2d 623 (Ind. Ct. App. 1979).

160. 518 N.E.2d 1120 (Ind. Ct. App. 1988).

in which the court refused to apply *Ross* to nonmedical professionals. Third, the *Tarr* court distinguished *Ross* as involving a doctor required to exercise independent professional judgment, whereas paramedics have no such responsibility, but are required to follow written protocol.¹⁶¹

161. *Tarr v. Jablonski*, 569 N.E.2d 378, 379-80 (Ind. Ct. App. 1991). The worker's compensation claim which the survivors filed against the employer was also denied for failure to prove that the employee's death was caused by the paramedics; therefore, the employee's death did not arise "out of employment." *Jablonski v. Inland Steel Co.*, 575 N.E.2d 1039 (Ind. Ct. App. 1991).



Survey of Professional Responsibility

JEFFREY D. TODD*

Although the survey period produced numerous and varied opinions on the subject of professional responsibility, this Article will focus on two opinions of significant importance to the practicing Bar. One opinion was delivered by the United States Supreme Court and the other by the Indiana Supreme Court.

I. PRETRIAL STATEMENTS TO THE MEDIA

A. *Gentile v. State Bar of Nevada*

In *Gentile v. State Bar of Nevada*,¹ the United States Supreme Court held Nevada Supreme Court Rule 177, which is identical to Indiana Rules of Professional Conduct Rule 3.6,² to be void for vagueness as

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1. 111 S. Ct. 2720 (1991).

2. (a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or a witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation

applied by the Nevada Supreme Court.³ This opinion reversed a decision by the Nevada Supreme Court that Gentile, a criminal defense attorney from Las Vegas, violated Rule 177 by making certain statements to the media at a press conference, which he held six months prior to his client's trial.⁴

The case arose from Gentile's representation of Grady Sanders, the owner of Western Vault Corporation. Western Vault was in the business of storing valuables for its customers in secure strongboxes. On January 31, 1987, the Las Vegas Metropolitan Police Department reported substantial quantities of cocaine and traveler's checks missing from one of the deposit boxes at Western Vault. These items were used in conjunction with an undercover operation. After these items were reported missing, the Las Vegas sheriff stated to the media that certain undercover police and Western Vault employees were suspects. Although two undercover policemen had free access to the vault, police investigators quickly focused on the theory that the employees of Western Vault took the missing items. This fact became public when the Las Vegas sheriff pronounced to the media early in the investigation that he had "complete faith and trust" in his officers.⁵

As the investigation progressed, the media reported that other vault owners were reporting items missing from deposit boxes at Western

and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding paragraphs (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

- (1) the general nature of the claim or defense;
- (2) the information contained in a public record;
- (3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal case:
 - (i) the identity, a residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the fact, time and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

INDIANA RULES OF PROFESSIONAL CONDUCT Rule 3.6 (West 1991) (effective Jan. 1, 1987).

3. *Gentile*, 111 S. Ct. at 2730.

4. *Id.* at 2738.

5. *Id.*

Vault. Soon after this information was made public, Western Vault began losing customers and was eventually forced out of business. The Las Vegas police then searched other boxes at Western Vault. It was reported in the press that these searches led to the seizure of \$264,900 from a box that was listed as unrented.

As time passed, the media noted that the police investigation had failed to positively identify the thief. Through a process of elimination, the media then began to focus its own independent investigation in the direction of Sanders. The press reported that the police now theorized that the theft of the cocaine and traveler's checks was part of a concerted effort to discredit the undercover operation. It was further reported that a business relationship existed between Sanders and the target of a separate undercover police probe.

At this stage of the police investigation, the Deputy Police Chief of Las Vegas stated publicly that the two detectives who had access to the vault were no longer suspects. Local newspapers also reported that an unnamed source informed them that the police now believed the thief had unwittingly stolen the items from the police. The press concluded by indicating that Sanders "could not be reached for comment."⁶ Later, the press reported that the two undercover detectives had been eliminated as suspects because each passed polygraph examinations. The same story ended with the observation that Sanders had refused to submit to a polygraph examination.

Sanders's attorney, Gentile, monitored these media reports and concluded that for the first time in his distinguished career, he would call his own press conference in an effort to counter the negative reporting about his client.⁷ Before arriving at this conclusion, Gentile researched Rule 177 and United States Supreme Court opinions which addressed the issue of counsel's duties and ethical obligations regarding pretrial publicity.

Gentile decided that the timing of a statement was critical in assessing whether it might possibly prejudice the forthcoming trial and thereby expose him to disciplinary action.⁸ With this in mind, Gentile scheduled

6. *Id.*

7. In a separate opinion, Justice Kennedy noted that Gentile had been an Associate Dean of the National College for Criminal Defense Lawyers and Public Defenders as well as the author of articles about criminal law.

8. One case Gentile relied upon was *Patton v. Yount*, 467 U.S. 1025 (1984). In this case, Yount's original conviction for murder was overturned. Prior to this trial there had been extensive pretrial publicity about the case. Yount was convicted upon retrial and he appealed, claiming that pretrial publicity had made a fair trial impossible in the county where the proceedings took place. The Court rejected this argument, finding that there was little publicity prior to the second trial and that the one and one-half years which had passed between the reversal of the first conviction and the second trial rebutted any presumption of prejudice to the proceedings that existed at the time of the first trial.

his press conference for the day after his client was indicted. By waiting until after the indictment, he was aware that his client's trial would not take place for at least six months. This, he reasoned, was a sufficient amount of time prior to the trial to eliminate the possibility of prejudicing the proceeding.

At the press conference, Gentile declared: (1) the evidence demonstrated his client's innocence; (2) the likely thief was a police detective, Steve Scholl; and (3) the other victims were not credible because most were drug dealers or convicted money launderers, all but one of whom had only accused Sanders in response to police pressure in the process of "trying to work themselves out of something."⁹ On more than one occasion Gentile was asked to elaborate on portions of his statements but refused. At one point, he indicated that he could not elaborate because ethics prohibited him from doing so.

Sanders's trial took place as scheduled in August of 1988. During the jury selection process, not a single juror selected acknowledged any specific recollection of Gentile's press conference when questioned by the trial court judge. The trial ended with the jury acquitting Gentile's client.

After the trial, the State Bar of Nevada filed a disciplinary complaint against Gentile alleging that his statements at the pretrial press conference constituted conduct which violated Nevada Supreme Court Rule 177. The Nevada Supreme Court upheld the Nevada Disciplinary Board's decision that Gentile violated the Rule and its conclusion that he should receive a private reprimand. In doing so, the Nevada Supreme Court rejected Gentile's argument that Rule 177, as it existed, violated his right to free speech guaranteed by the United States Constitution and found that Gentile knew or should have known that there was a substantial likelihood that his pretrial statements would materially prejudice his client's trial.¹⁰

On appeal to the United States Supreme Court, Gentile argued that the First Amendment required Nevada to demonstrate that his pretrial statements constituted a "clear and present danger" of "actual prejudice or an imminent threat" of prejudice to the trial before he could be subject to discipline.¹¹ His position was that the "substantial likelihood

9. *Gentile v. State Bar of Nev.*, 111 S. Ct. 2720, 2729 (1991) (citing Findings and Recommendations of the State Bar of Nevada, Southern Nevada Disciplinary Board).

10. *Gentile v. State Bar of Nev.*, 787 P.2d 386, 387 (1990), *rev'd*, 111 S. Ct. 2720 (1991). Note that the prosecutor was not disciplined for violating Nevada's equivalent of Indiana Rules of Professional Conduct Rule 3.8 which requires prosecutors to exercise reasonable care to prevent the police from making extrajudicial statements that the prosecutor is prohibited from making. GEOFFREY HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 3.6:102, at 666.1 (2d ed. 1991).

11. *Gentile*, 111 S. Ct. at 2742.

of material prejudice" language used in Rule 177 was a standard which failed adequately to protect his right to free speech.¹² The Court rejected this argument for a more stringent standard for the protection of speech by a lawyer.¹³ Despite this finding, the Court reversed the decision of the Supreme Court of Nevada for various other reasons.¹⁴

Gentile's argument for a stricter standard than enunciated in Rule 177 relied on cases in which the Court had examined the constitutionality of restraints on the press during the pendency of criminal trials such as *Nebraska Press Association v. Stuart*,¹⁵ in which the Court held that media commentary on evidentiary matters could not be suppressed unless the publicity would result in the inability to find jurors who could render a verdict untainted by the publicity.¹⁶ Writing for the majority, Chief Justice Rehnquist noted a palpable distinction between attorneys, who are actual participants in a trial, and the press, which simply observes and reports on judicial proceedings.¹⁷ The majority found that statements made by an attorney prior to a trial are more likely to influence a prospective juror than are statements made by the media, who are not associated with the parties to the proceedings.¹⁸ The Court further observed that historically, attorney speech has been subject to many restrictions, ranging from objections during trial to restraints placed upon the solicitation of clients.¹⁹ Balancing a lawyer's First Amendment rights against the state's legitimate interest in regulating the lawyer's speech in order to protect the sanctity of judicial proceedings, the Court held that the "substantial likelihood" test found in Rule 177 is constitutionally sound because "it is designed to protect the integrity and fairness of a state's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech."²⁰

12. *Id.* at 2738.

13. *Id.*

14. *Id.* at 2736. Justice Kennedy announced the judgment of the Court and delivered the opinion with respect to Parts III and VI. Chief Justice Rehnquist delivered the opinion of the Court with respect to Parts I and II.

15. 427 U.S. 539 (1976).

16. *Id.* at 554.

17. *Gentile v. State Bar of Nev.*, 111 S. Ct. 2720, 2755 (1991).

18. *Id.* at 2736.

19. *Id.* at 2742. See *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990) (a state may discipline a lawyer for making misleading statements regarding alleged credentials as a certified specialist in a particular area of practice); *Sacher v. United States*, 343 U.S. 931 (1952) (counsel may argue points of law to a trial court, but may be held in contempt of court for arguing a point beyond that which is necessary to preserve his point for appeal).

20. *Gentile*, 111 S. Ct. at 2745. A leading treatise on professional responsibility noted that the "substantial likelihood of material prejudice" standard used in Model Rule of Professional Conduct Rule 3.6 was intended by the drafters to approximate the "clear and present danger" standard. HAZARD & HODES, *supra* note 10, at 666.

After examining the "material prejudice" standard as it relates to an attorney's First Amendment rights, a majority of the Court turned to the grammatical structure of Rule 177.²¹ The Court found that the Rule contained a "safe harbor" provision which misled Gentile into believing that he would not be disciplined for making the type of pretrial statements he made to the press and held that this "safe harbor" provision rendered the Rule void for vagueness.²² Noting that the prohibition against vague regulation of speech is meant to protect against discriminatory enforcement, the Court found Rule 177 to be so imprecise as to make discriminatory enforcement "a real possibility."²³

The Court closely examined the language of Rule 177(3)(a)²⁴ from which it concluded that a lawyer

"may state without elaboration . . . the general nature of the . . . defense." Statements under this provision are protected "[n]otwithstanding subsections 1 and 2(a-f)." By necessary operation of the word "notwithstanding," the Rule contemplates that a lawyer describing the "general nature of the . . . defense" "without elaboration" need fear no discipline, even if he comments on "[t]he character, credibility, reputation or criminal record of a . . . witness," and even if he "knows or reasonably should know that [the statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding."²⁵

The majority believed that the phrase "general nature of the defense" was so imprecise that it failed to give reasonable notice to Gentile as to what matters regarding the trial he could discuss without the fear of discipline from the State Bar.²⁶

B. Effect on the Indiana Bar

Rule 3.6 of Indiana Rules of Professional Conduct is identical to Nevada Supreme Court Rule 177. The *Gentile* decision, therefore, also renders Indiana's Rule 3.6 void for vagueness. Until the Indiana Supreme Court modifies the Rule, its Disciplinary Commission cannot successfully prosecute a disciplinary charge for violation of the Rule.

21. *Gentile*, 111 S. Ct. at 2731.

22. *Id.*

23. *Id.* at 2732.

24. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 3.6 (a)-(f) (West 1991) (Indiana safe harbor provision).

25. *Gentile v. State Bar of Nev.*, 111 S. Ct. 2720, 2731 (1991) (quoting NEV. SUP. CT. R. 177(3)(a)).

26. *Id.*

Short of devising a completely new rule regarding trial publicity, the Indiana Supreme Court could simply eliminate the existing "safe harbor" provision. This would modify Rule 3.6 so as to give an attorney notice that a particular extrajudicial statement may be made only if the lawyer knows or should know that the statement will not have a substantial likelihood of materially prejudicing an adjudicative proceeding. Such a Rule would give counsel reasonable notice of the type of statements which may warrant disciplinary action and will result in a constitutionally sound restraint on lawyers' speech. If such a Rule is adopted by the Indiana Supreme Court, any disciplinary proceeding brought against an attorney alleging the violation of such a Rule will become extremely fact sensitive. The operative test will be whether statements have a substantial likelihood of materially prejudicing an adjudicative proceeding.

The likelihood of prejudice naturally depends on the substance of the extrajudicial statement. In addition, the timing of the statement in relationship to the trial will be a key element of the disciplinary case. The greater the time between the statement and the trial, the less the likelihood of material prejudice.

A close examination of the size of the jury pool will also be relevant. The larger the community, the greater the chance that jurors could be found who have no recollection of the lawyer's statement. It could also be argued that a bench trial is less likely to be materially prejudiced by extrajudicial statements. Unlike jurors, judges are familiar with the idea that the trier of fact must render a verdict based solely upon the evidence presented at trial.

II. THE USE OF RETAINING LIENS AS A METHOD OF SECURING THE PAYMENT OF ATTORNEY'S FEES

An opinion issued by the Indiana Supreme Court during the survey period, *In re Gemmer*,²⁷ brings into question the continued efficacy of attorney's retaining liens in Indiana.

Two types of liens have traditionally been available to attorneys in this state. One is a charging lien and the other is a retaining lien. A charging lien is an equitable lien created by statute which provides that an attorney may hold a lien for fees earned on any judgment lawfully obtained on behalf of the client.²⁸ The distinguishing characteristic of a retaining lien is that it provides an attorney with the right to retain items of property belonging to the client which come into the possession

27. 566 N.E.2d 528 (Ind. 1991).

28. Charging liens have been codified in Indiana for over 110 years. See IND. REV. STAT. § 5276 (1881) (presently codified at IND. CODE § 33-1-3-1 (1988)).

of the attorney during the course of her representation until the client pays the attorney for the services rendered. Retaining liens allow an attorney to retain not only monies, but papers provided to her by the client, as well as the attorney's work product. Retaining liens are equitable in origin and have been recognized by the common law for three centuries.²⁹ They can be an extremely effective tool for collecting fees. The attorney can exert great leverage when the client needs the retained material to continue to prosecute or defend a claim.

Rule 1.16 of the Indiana Rules of Professional Conduct touches upon the issue of retaining liens in that it requires an attorney to protect or preserve a client's claim in the event the representation is terminated.³⁰ Subsection (d) of this Rule focuses on the attorney's ethical obligations in regard to surrendering papers or property when the attorney-client relationship ends. The Rule states as follows:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.³¹

In addition, Disciplinary Rule 9-102(B)(4) of the Indiana Code of Professional Responsibility,³² which governed attorney ethics in this area of practice prior to the adoption of the Indiana Rules of Professional Conduct, required that an attorney should "promptly pay or deliver to the client as requested by a client the funds, securities or other properties in the possession of the lawyer which the client is entitled to receive."³³

The first Indiana Supreme Court decision to address the issue of retaining liens was *State ex rel. Shannon v. Hendricks Circuit Court*.³⁴ In *Shannon*, an attorney named Maxwell represented Shannon in an action to dissolve her marriage.³⁵ During the course of the representation,

29. Note, *Attorney's Retaining Lien Over Former Client's Papers*, 65 COLUM. L. REV. 296, 298 (1965).

30. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.16 (West 1991).

31. *Id.*

32. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102(B)(4) (repealed 1986).

33. *Id.*

34. 183 N.E.2d 331 (Ind. 1962).

35. Interestingly, Maxwell represented Shannon on a contingent fee basis. Contingent fees in family law matters are now prohibited by Indiana Rules of Professional Conduct Rule 1.5(d)(1) (West 1991).

Maxwell came into possession of two certified checks which represented a portion of the property settlement agreement entered into by the parties to the dissolution. Maxwell did not receive payment of his fees after the trial court issued a proper dissolution decree. As a result, Maxwell retained the certified checks which his client was to receive under the terms of the agreement and held them as a lien against the fees she owed to him. Of course, Maxwell's client wanted him to return the certified checks. She proceeded to request that the trial court issue an order requiring Maxwell to pay her the monies received by him. The court granted this request and after Maxwell failed to comply, found him in contempt of court.

On appeal, the Indiana Supreme Court reversed, holding that an attorney has the right to a retaining lien until her client has paid the balance of the attorney's fees.³⁶ The *Shannon* court failed to discuss the relationship, if any, between the right to such a lien and any ethical duty counsel may have reasonably to protect a client's interests upon termination of the representation.

The first case in Indiana to discuss attorney ethics and retaining liens was *Bennett v. N.S.R., Inc.*³⁷ Bennett served as counsel for N.S.R. in a matter requiring litigation. Before the litigation was completed, Bennett and N.S.R. severed their attorney-client relationship. When N.S.R. failed to pay Bennett for the legal services rendered, he brought an action against his former client to recover these fees. At the same time, N.S.R. demanded that Bennett return certain documents in his possession so that N.S.R. might proceed with litigation. Bennett refused, and as a result, the trial court issued a *subpoena duces tecum* to Bennett for the production of N.S.R.'s records. Bennett moved to modify the subpoena and claimed that he had a valid retaining lien over the documents. This motion was denied. Thereafter, Bennett moved to quash the subpoena. This motion was also denied. Bennett then appealed the denial of his motions.

The Indiana Court of Appeals reversed the trial court and recognized Bennett's right to assert a retaining lien over documents obtained during the course of the representation.³⁸ The court found that retaining liens are not materially distinguishable from a valid mechanic's lien.³⁹ Further, the court held that N.S.R. was entitled to the records in question only if it gave Bennett adequate security to obtain payment of the fees.⁴⁰

36. *Shannon*, 183 N.E.2d at 332.

37. 553 N.E.2d 881 (Ind. Ct. App. 1990).

38. *Id.* at 883.

39. *Id.* at 882.

40. *Id.* at 883.

In arriving at its judgment, the court specifically rejected N.S.R.'s argument that retaining liens are unethical and "should be disallowed when they cause hardship or inconvenience to the client."⁴¹ The court noted that Rule 1.16(d) provides for the retention of records belonging to a client to the extent permitted by law and that attorney's liens have been recognized in Indiana as proper.⁴² The court therefore held that attorney's liens are lawful and ethical in this state until such time as Rule 1.16(d) is modified by the Indiana Supreme Court, which has exclusive jurisdiction over attorney discipline.⁴³

Less than one year after *Bennett*, the Indiana Supreme Court issued its opinion in *In re Gemmer*.⁴⁴ Unlike either *Bennett* or *Shannon*, *Gemmer* was an attorney disciplinary case. In *Gemmer*, Donald Hall retained Gemmer to represent him in a dispute with the Indiana Department of Revenue. The Department of Revenue was asserting that Hall failed to pay over \$100,000 in sale and use taxes in connection with two automotive businesses he owned. By October 1, 1983, Hall had paid Gemmer \$2,300 of an agreed \$2,500 retainer. Moreover, Hall's automotive businesses performed work worth \$1,011 on Gemmer's automobile, which the two agreed would be deducted from Gemmer's fees.

Soon after he was retained, Gemmer negotiated an agreement with the Department of Revenue whereby Hall would pay \$10,000 immediately to the Department of Revenue in exchange for a recall of the outstanding tax warrants. In addition, Gemmer agreed to review his client's records. This review was to be completed before October 31, 1983. Pursuant to this agreement, Hall provided Gemmer with voluminous records generated by his businesses. About one week prior to the review deadline, Gemmer told Hall that contrary to Hall's belief, the records failed to show a misapplication of sales tax to certain nontaxable items or to labor. Upon hearing this from Gemmer, Hall became convinced that neither Gemmer nor an accountant hired by Gemmer actually examined the records.

On October 11, 1983, Hall notified Gemmer in writing that his services were terminated because Hall wished to retain different counsel. In addition, Hall informed Gemmer that he would personally come to Gemmer's office on October 13, 1983 to collect his business records. The day before notifying Gemmer of termination, Hall received a bill from Gemmer totalling \$5,125. This bill incorrectly credited Hall with having paid only \$1,300 toward the retainer. Moreover, it incorrectly

41. *Id.* at 884.

42. *Id.* at 883.

43. *Id.* at 884. (citing IND. CONST. art. VII, § 4; IND. R. ADMISSION & DISCIPLINE 23, § 1).

44. 566 N.E.2d 528 (Ind. 1991).

listed the value of the car repairs as \$849.30. Finally, the bill requested \$2,648.75 in fees owed to an accountant who, Gemmer claimed, had reviewed Hall's records.

On October 13, Gemmer failed to relinquish the records to Hall and informed Hall that he would not do so until his fees were paid. Subsequent attempts to obtain the documents by Hall and his new counsel fell on deaf ears. About three weeks after being discharged by Hall, Gemmer advised the Department of Revenue in writing that Hall had no records to support his theory that there had been a misapplication of the sales tax. Gemmer did not consult with Hall or receive Hall's permission to communicate with the Department of Revenue before making this pronouncement. Hall was never able to recover his records from Gemmer. As a result, he was unable to use the documents in his dispute with the Department of Revenue or in an Internal Revenue Service audit covering the same period.

Eventually, Gemmer filed a document entitled Attorneys Equitable Lien Against Real Estate, in the recorders office in the county where Hall lived. This "lien" was filed against Hall's residence and also against a parcel of land Hall was purchasing on contract from Paul and Jane Baldwin. Hall then filed for bankruptcy protection and obtained the discharge of Gemmer's attorney's fees. Thereafter, the Baldwins filed an action to foreclose upon the property Hall was purchasing on contract. Because of Gemmer's recorded "lien," the Baldwins were forced to include Gemmer as a party to the foreclosure action. Upon receiving notice of the Baldwin's claim, Gemmer filed a cross-claim against Hall in which he sought to foreclose his "lien." This required Hall to obtain counsel to defend against Gemmer's cross-claim.

In a unanimous opinion, the Indiana Supreme Court found that Gemmer violated Indiana Code of Professional Responsibility Disciplinary Rule 4-101(B)(1)⁴⁵ by disclosing client confidences to the Department of Revenue and Indiana Code of Professional Responsibility Disciplinary Rule 7-102(A)(2)⁴⁶ by placing a lien against the real estate before obtaining a judgment.⁴⁷ These conclusions are not remarkable based upon the court's findings of fact. What does warrant attention is the court's

45. Indiana Code of Professional Responsibility DR 4-101(B)(1) (repealed 1986) provided: "Except when permitted under D.R. 4-101(C), a lawyer shall not knowingly . . . reveal a confidence or secret of his client."

46. Indiana Code of Professional Responsibility DR 7-102(A)(2) (repealed 1986) provided: "In his representation of a client, a lawyer shall not . . . [k]nowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for extension, modification or reversal of existing law."

47. *Gemmer*, 566 N.E.2d at 531.

conclusion that "such findings clearly establish that by failing to return Hall's records, the Respondent violated D.R. 9-102(B)(4)."⁴⁸

In arriving at this conclusion, the court failed to reconcile its decision with *Bennett* or *Shannon* which clearly held that retaining liens are valid and ethical in Indiana.⁴⁹ The failure of the court to discuss *Shannon* or *Bennett* in arriving at its decision in *Gemmer* makes its holding difficult to justify; however, several possible reasons exist for the court's decision in *Gemmer*.

First, *Gemmer* is strictly a disciplinary case. In a disciplinary matter, a hearing officer appointed by the court hears evidence and makes findings of fact and conclusions of law which are then reviewed by the court.⁵⁰ When reviewing these findings, the court is not acting in its appellate capacity. Rather, the review process entails a de novo examination of all matters presented. The review is not only of the hearing officer's findings, but also of the entire record tendered in the case. Although the hearing officer's findings receive emphasis, the court ultimately makes its own findings as to misconduct and then determines the appropriate sanction.⁵¹

This de novo review of the evidence forces the court to focus on the facts of the case before it. The court then analyzes the facts under the Indiana Rules of Professional Conduct. Disciplinary opinions are typically devoid of citations to precedent, except in the portion of the opinion dealing with the appropriate sanction for the attorney. It is quite rare to find an opinion which contains citations to anything other than earlier disciplinary opinions. Because the court was the ultimate finder of fact, it may have focused on making factual findings to the neglect of discussing civil precedent such as *Bennett*, which touched on only one aspect of the *Gemmer* case.⁵²

A second possible explanation for the court's failure to distinguish *Gemmer* from *Bennett* and *Shannon* may be that the court found it unnecessary. In both *Shannon* and *Bennett*, the attorneys claiming retaining liens had essentially clean hands, which is a prerequisite to invoking an equitable remedy such as a retaining lien. In particular, the amount of their fees was not in dispute. By contrast, *Gemmer* failed

48. *Id.*

49. See *State ex rel. Shannon v. Hendricks Circuit Ct.*, 183 N.E.2d 331, 334 (Ind. 1962); *Bennett v. N.S.R., Inc.*, 553 N.E.2d 881, 884 (Ind. Ct. App. 1990).

50. See IND. R. ADMISSION & DISCIPLINE 23, § 14.

51. *In re Kern*, 555 N.E.2d 479 (1990).

52. Attorney *Gemmer* was found guilty of violating Indiana Code of Professional Responsibility DR 9-102(B)(4), 4-101(B)(1), 1-102(A)(5), (6) (repealed 1986) in two separate counts of the Verified Complaint for Disciplinary Action. After reviewing his conduct as a whole, the court suspended him from the practice of law for a period of three years.

to credit his client for over \$1,000 in payments made and charged him approximately \$2,600 for an accountant's services, despite the lack of evidence that an accountant actually reviewed the relevant records. If Gemmer's fraudulent claim forfeited his right to a retaining lien for additional fees, then he had no legal authority to retain the records. His conduct then would unquestionably be in violation of Disciplinary Rule 9-102(B)(4) and Disciplinary Rule 1.16(d) of the Indiana Rules of Professional Conduct.

In conclusion, the Indiana Supreme Court's decision in *Gemmer* leaves in doubt whether attorney retaining liens are ethical in this state. Until the court issues an opinion reconciling *Bennett*, *Shannon*, and *Gemmer*, Indiana attorneys should be aware that a claim to a retaining lien may result in disciplinary action.



Indiana Power of Attorney Act

JEFFREY KOLB*

INTRODUCTION

From its humble common-law origins, the power of attorney is now a preeminent estate planning tool rivaling the will as a necessary consideration. As its most recent embodiment of law on powers of attorney, Indiana adopted the Power of Attorney Act.¹ This new Act views the power of attorney as a tool to achieve planning and other goals and attempts to provide maximum flexibility in the design and use of that tool. To understand the new Indiana Power of Attorney Act, it is important to know the history of powers of attorney and the origin of many of the new provisions. This is particularly true in the rapidly changing area of surrogate health care decisionmaking.

I. OVERVIEW

A. *Trust Code Analogy*

In 1971, Indiana adopted the unique and innovative Trust Code.² The Trust Code codified many common-law concepts, consolidated scattered legislative enactments, and created universal trust provisions on powers, duties, and procedures for trusts lacking specification for these provisions. Overall, it simplified trust law in Indiana and made trusts easier to use.

In 1991, a similar situation existed for the power of attorney law in Indiana. The Uniform Durable Power of Attorney Act of 1976 provided the basic framework for durable powers, appointment of guardians, and protection of third parties.³ Nevertheless, it failed to address procedural problems such as multiple or successor attorneys-in-fact and substantive problems such as liability of the attorney-in-fact or the liability of third persons.⁴ Most importantly, it failed to delineate the powers of an attorney-in-fact.⁵

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1. Pub. L. No. 149-1991 (to be codified in IND. CODE §§ 30-5-1-1 to -12-8).

2. IND. CODE §§ 30-4-1-1 to -7-10 (1988 & Supp. 1991).

3. IND. CODE §§ 30-2-1.5-1 to -2 (repealed 1991).

4. *Id.*

5. *Id.*

In addition, Indiana had other specific statutory enactments related to powers of attorney, including statutes on powers of attorney by servicemen and statutes detailing how to record a power of attorney.⁶ Both statutes were limited and potentially dangerous. For example, the recording statute created a trap by requiring that the power of attorney be recorded before the attorney-in-fact executed the document to be recorded.⁷

The Indiana Power of Attorney Act was designed to accomplish several goals: to unify all of the Indiana statutory procedures regarding powers of attorney, to provide rules to govern the procedure of multiple and successor attorneys-in-fact, to provide rules with regard to liabilities of individuals involving the attorney-in-fact, to provide detailed and specific powers which could be incorporated by reference, and finally, to address the issue of health care powers.

B. Something Borrowed

The Indiana Power of Attorney Act contains many provisions borrowed from other states. Generally, definitions and provisions related to medical health care powers came from the recently enacted Illinois statute.⁸ Minnesota law provided provisions related to third parties and liability.⁹ Transitional rules were adapted from the Trust Code,¹⁰ and a rule regarding compensation was taken from the Uniform Transfers to Minors Act.¹¹ The basic provisions of the Uniform Durable Power of Attorney Act were also carried over with some minor changes.¹²

The extensive and detailed list of powers originally came from New York but is taken from the Minnesota adaption. Both Minnesota and New York provided a statutory form of power of attorney;¹³ however, this approach has been specifically rejected in the Indiana Power of Attorney Act because of the potential abuse by individuals executing powers without legal advice.¹⁴ Instead, Indiana opted for the incorpo-

6. IND. CODE §§ 29-2-17-1 to -5 (repealed 1991) (serviceman); IND. CODE § 32-1-10-1 to -2 (repealed 1991) (recording powers).

7. IND. CODE § 32-1-10-2 (1988).

8. See ILL. REV. STAT. ch. 110 1/2, para. 801-1 to -12 (Smith-Hurd 1991).

9. See MINN. STAT. § 523.02 to -.25 (1990).

10. IND. CODE § 30-5-1-1 (Supp. 1991).

11. *Id.* § 30-5-4-5 (adopted from IND. CODE § 30-2-8.5-30).

12. IND. CODE §§ 30-2-1.5-1, -2 (repealed 1991).

13. MINN. STAT. ANN. §§ 523.01 to -.25 (West 1990); N.Y. GEN. OBLIG. LAW §§ 5-1501 to -1602 (McKinney 1989 & Supp. 1992).

14. See COLLINS ET AL., DRAFTING THE DURABLE POWER OF ATTORNEY — A SYSTEMS ARRIVAL 17 (2d ed. 1991).

ration by reference method used in Pennsylvania.¹⁵ The intent is for a lawyer to provide advice before the power of attorney is drafted.

C. *Something New*

The Indiana Power of Attorney Act takes advantage of its young status to provide something new. The recording provisions are new and reverse the position of the old statute on recording powers of attorney.¹⁶ Rules related to multiple and successor attorneys-in-fact create presumptions which are also unique to power of attorney statutes.¹⁷ Also unique to the Power of Attorney Act is the use of a copy that has been certified by the attorney-in-fact and the ability to exonerate the attorney-in-fact for all acts except those done in bad faith.¹⁸

D. *Health Care*

Health care powers are treated separately in this presentation. In the original draft of the Indiana Power of Attorney Act, a health care power was provided for incorporation by reference similar to other property powers. The net effect of changes made during the legislative session was to make the Indiana Health Care Consent Act into a health care power of attorney whereby health care powers can be given to a health care representative in a document separate from that used for the power of attorney. While this creates a clear distinction between the designation of a health care representative with health care powers and an attorney-in-fact with property or estate powers, it also incorporates by reference two different legal concepts.

II. POWER OF ATTORNEY

A. *History*

1. *Common Law*.—A power of attorney is an agency relationship between a principal and an agent; accordingly, it is controlled by the law of agency under the common law.¹⁹ Many common-law rules relating to the nondelegability of certain powers or duties still apply in the application of powers of attorney to marriage, oath taking, and voting.²⁰ Similarly, many of those limitations still apply to the new Indiana Power of Attorney Act.

Perhaps the most important limitation under the common law was the termination of the power of attorney by the incapacity or disability

15. See IND. CODE § 30-5-5-1 (Supp. 1991).

16. IND. CODE §§ 32-1-10-1, -2 (repealed 1991).

17. IND. CODE § 30-5-4-3, -4 (Supp. 1991).

18. *Id.* §§ 30-5-8-5, 30-5-9-1(b).

19. COLLINS, *supra* note 14, at 5.

20. *Id.*

of the principal. This limited the effectiveness of the power of attorney particularly when it was being used on behalf of the principal to take care of the principal's property. The Indiana Power of Attorney Act makes powers of attorney executed in accordance with its provisions effective until actual knowledge of the principal's death²¹ or until the power terminates under its own provisions.²²

Although not a limitation, the traditional use of a power of attorney under the common law was to manage property. For example, Indiana statutes concerning powers of attorney prior to the recent enactment of the Indiana Power of Attorney Act referred to powers specifically designated in the document regarding property specifically designated in the document.

2. *Uniform Probate Code*.—In the late 1960s, the National Conference of Commissioners on Uniform State Laws recognized that a guardianship or conservatorship had become increasingly cumbersome and expensive.²³ In 1964, it approved a Model Special Power Of Attorney for Small Property Interest Act, which was the forerunner of the durable power section of the 1969 Uniform Probate Code.²⁴ Later, the durable power of attorney, which remains effective even upon the incapacity of the principal, was proposed as part of the Uniform Probate Code based on a Virginia statute.²⁵ In addition to handling the management of property, the intent was to allow the attorney-in-fact to handle matters relating to the care and custody of the principal as well.²⁶

The success of the Uniform Probate Code and durable powers is evident from the fact that all fifty states have now enacted legislation recognizing "the concept." Indiana adopted "the concept" from the Uniform Probate Code in 1976.²⁷ Its version recognized the durability of the power of attorney and set down some general rules regarding accounting to the guardian and the guardian's power to revoke or suspend the power.²⁸ It also established an affidavit requirement for the attorney-in-fact regarding knowledge of the termination of the power and introduced the concept of a "springing" power of attorney which becomes effective upon the principal's incompetence.²⁹

3. *Uniform Durable Power of Attorney Act*.—The National Conference of Commissioners on Uniform State Laws next developed a free-

21. IND. CODE § 30-5-10-4(b) (Supp. 1991).

22. *Id.* § 30-5-10-2.

23. See COLLINS, *supra* note 14, at 6.

24. See *id.* at 7-8.

25. See *id.* at 7.

26. See *id.* at 7-8.

27. IND. CODE §§ 30-2-1.5-1, -2 (repealed 1985).

28. *Id.*

29. *Id.*

standing act that could be adopted without the Uniform Probate Code. This act, known as the Uniform Durable Power of Attorney Act was adopted by Indiana in 1985, repealing the prior Uniform Probate Code provisions.³⁰

The Uniform Durable Power of Attorney Act contained many improvements. The Act further specified presumptions and reasons for third parties to rely on the power of attorney.³¹ It also addressed the conflict between the guardian and the attorney-in-fact by allowing the principal to nominate a guardian in the durable power of attorney and requiring the court to make the appointment in accordance with the nomination except for good cause or disqualification.³² Despite these improvements, the Uniform Durable Power of Attorney Act was still silent on many aspects of durable powers of attorney including multiple attorneys-in-fact, successors, and powers granted under a durable power.³³

4. *Uniform Statutory Form Power of Attorney Act*.—The National Conference of Commissioners on Uniform State Laws next adopted the Uniform Statutory Form Power of Attorney Act.³⁴ This Uniform Act was based on similar acts in Minnesota, New York, California, and Illinois.³⁵ The Act provides a form by which individuals can select powers to give their attorney-in-fact without detailing all of the powers to be granted. The details of the powers were included in the statute. Although Indiana has not adopted this Act, it is influential in the current trend of durable powers of attorney.

B. Requirements

1. *Not Exclusive*.—Under the Indiana Power of Attorney Act, “[a] power of attorney is valid if the power of attorney was valid at the time the power of attorney was executed under any of the following:

- (1) This article, [The Power of Attorney Act].
- (2) I.C. 30-2-11.
- (3) Common law.
- (4) The law of another state or foreign country.”³⁶

Common-law powers of attorney, powers of attorney executed under the old Durable Power of Attorney Act, and powers of attorney under

30. IND. CODE §§ 30-2-11-1 to -7 (repealed 1991).

31. *Id.*

32. *Id.*

33. *Id.*

34. UNIF. STATUTORY FORM POWER OF ATTORNEY ACT, 8A U.L.A. 151 (Supp. 1991).

35. IND. CODE §§ 30-2-11-1 to -7 (repealed 1991).

36. IND. CODE § 30-5-3-2 (Supp. 1991).

this article, are valid. The statute provides a conflict of laws rule similar to that provided for wills through which Indiana recognizes powers of attorney executed under the laws of other states.³⁷ Hopefully, other states will adopt similar rules to assist in the conflict of laws problem that arises when individuals holding these powers of attorney travel to other states.³⁸

The new Indiana Power of Attorney Act is not exclusive. Its intent is to provide another, hopefully simpler, way to create and use powers of attorney and not to exclude or invalidate powers of attorney not created in conformity with its provisions.³⁹

2. *Principal*.—The new Indiana Power of Attorney Act, borrowing from the Illinois Act, includes, as a principal, individuals acting as a trustee, personal representative, or fiduciary.⁴⁰ Concerns were raised in the Indiana House of Representatives Judiciary Committee about whether or not this provision, coupled with the fiduciary powers that could be incorporated by reference, would give the fiduciary the authority to delegate all powers to an attorney-in-fact. Accordingly, additional language was added to the fiduciary powers provision, making it clear that it only applies when the fiduciary has the power to delegate.⁴¹

3. *Formalities*.—Under the new Indiana Power of Attorney Act, the power of attorney must:

- Be in writing
- Name an attorney-in-fact
- Give the attorney-in-fact the power to act on behalf of the principal
- Be signed by the principal in the presence of a notary public.⁴²

The notary requirement was added by the Indiana House of Representatives Judiciary Committee to provide a safeguard before the power is executed and to assure that the document could be recorded.

C. *Attorney-in-Fact*

1. *Qualifications*.—Prior Indiana law limited the attorney-in-fact to an individual or a corporation authorized to be a fiduciary under Indiana

37. *Id.* § 30-5-3-2(4) (adapted from MINN. STAT. § 523.02 (1990)).

38. Indiana now recognizes a power of attorney created under any state statute. This also includes any power an Indiana resident may validly execute under other state laws. Although this was not the original intent of the statute, it is not necessarily a strained interpretation. It is impossible to distinguish between a nonresident who has a certain power of attorney and a resident who has the same power of attorney and to say that one is effective in Indiana while the other is not.

39. IND. CODE § 30-5-2-8 (Supp. 1991).

40. *Id.* (adapted from ILL. REV. STAT. ch. 110, para. 802-3(e) (Smith-Hurd 1991)).

41. IND. CODE § 30-5-5-10 (Supp. 1991).

42. *Id.* § 30-5-4-1.

law. The Indiana Power of Attorney Act allows the attorney-in-fact to be the "person" designated to act for the principal under a power of attorney.⁴³ "Person" is defined to be "an individual at least 18 years of age, a corporation, trust or partnership."⁴⁴

2. *Multiple Attorneys-in-Fact*.—Prior Indiana law was silent with respect to multiple attorneys-in-fact and their respective duties. The new Indiana Power of Attorney Act specifically recognizes that more than one person may serve as an attorney-in-fact and states that, unless the power of attorney states otherwise, each named attorney-in-fact may act independently.⁴⁵ It also provides a rule of succession whereby any successor attorney-in-fact does not serve unless all original attorneys-in-fact fail to serve.

3. *Successor*.—Prior Indiana law made no reference to successor attorneys-in-fact. The new Indiana Power of Attorney Act specifically recognizes the fact that a successor may be named. The following six instances will trigger the naming of a successor:

1. The attorney-in-fact dies;
2. The attorney-in-fact resigns;
3. The attorney-in-fact is adjudged incapacitated by a court;
4. The attorney-in-fact cannot be located upon reasonable inquiry;
5. The attorney-in-fact, if at one time the principal's spouse, legally is no longer the principal's spouse; or
6. A physician familiar with the condition of the current attorney-in-fact certifies in writing to the immediate successor attorney-in-fact that the current attorney-in-fact is unable to transact a significant part of the business required under the power of attorney.⁴⁶

A problem related to successor attorneys-in-fact occurs if the original attorney-in-fact is somehow able to resume his or her duties. The statute mandates that unless the power of attorney states otherwise, the successor attorney-in-fact continues.⁴⁷ This is to avoid a "yo-yo effect" where the original attorney-in-fact may or may not fail or cease to serve.⁴⁸ The successor attorney-in-fact has all the powers of the original.⁴⁹

43. IND. CODE § 30-5-2-2 (Supp. 1991) (adapted from ILL. REV. STAT. ch. 110, para. 802-3(b) (Smith-Hurd 1991)).

44. *Id.* § 30-5-2-6.

45. *Id.* § 30-5-4-3.

46. *Id.* § 30-5-4-4.

47. *Id.* § 30-5-4-4(b).

48. *Id.*

49. *Id.* § 30-5-4-4(c).

4. *Compensation*.—Prior Indiana law made no reference to whether or not the attorney-in-fact was entitled to compensation. This led to some confusion, particularly upon the principal's death when the attorney-in-fact submitted a statement for services rendered.

The Indiana Power of Attorney Act borrows from the Uniform Transfers to Minors Act and states that, unless the power of attorney states otherwise, the "attorney-in-fact is entitled to reimbursement for all reasonable expenses advanced"⁵⁰ and is also entitled to "a reasonable fee" if the attorney-in-fact submits a request in writing to the principal for compensation within twelve months after the date the service is rendered.⁵¹

5. *Duties*

a. *Not required to act*

Prior Indiana law was silent with respect to whether or not the attorney-in-fact had a duty to act under the power of attorney. The Indiana Power of Attorney Act adapts from Illinois and Minnesota the provision that the attorney-in-fact is not required to exercise the powers granted under the power of attorney or to assume control or responsibility for any of the property or affairs regardless of the principal's physical or mental condition.⁵² This provision is necessary, as it would be difficult to find someone to act as an attorney-in-fact if the attorney-in-fact is required to use those powers in all circumstances.

b. *Due care*

Prior Indiana law was silent regarding the duty of care owed by the attorney-in-fact. The Indiana Power of Attorney Act states that the attorney-in-fact is to use due care in acting for the benefit of the principal unless the power of attorney states otherwise.⁵³ This provision was adapted from Illinois law and is a codification of the customary agency standard derived from the law of negligence.⁵⁴

c. *Accounting*

Prior Indiana law required the attorney-in-fact to be accountable to

50. *Id.* § 30-5-4-5(a).

51. *Id.* § 30-5-4-5(b).

52. *Id.* § 30-5-6-1 (adapted from ILL. REV. STAT. ch. 110 1/2, para. 803-4 (Smith-Hurd 1991); MINN. STAT. ANN. § 529.21 (West 1991)).

53. *Id.* § 30-5-6-2.

54. See ILL. REV. STAT. ch. 110 1/2, para. 802-7 (Smith-Hurd 1991).

the fiduciary of the principal. The Indiana Power of Attorney Act expands the concept of accountability by requiring the attorney-in-fact to keep complete records of all transactions entered into by the attorney-in-fact on behalf of the principal.⁵⁵ The Act is somewhat contradictory in that it states that no accounting is necessary unless stated otherwise in the power of attorney, but then requires an accounting if the "accounting is requested by the principal, a guardian appointed for the principal, or, upon the death of the principal, the personal representative of the principal's estate."⁵⁶ The Act requires no accounting unless requested by those fiduciaries listed.

6. *Liability*

a. *Standards*

Prior Indiana law was silent regarding the liability of the attorney-in-fact. The new Indiana Power of Attorney Act provides that the attorney-in-fact is generally liable for the negligent exercise of the power of attorney.⁵⁷ In the exercise of health care powers, the attorney-in-fact is only liable for actions undertaken in bad faith.⁵⁸ Also, an attorney-in-fact is not liable to a beneficiary of the principal's estate plan when acting under the "estate transaction" power unless the attorney-in-fact acts in bad faith.⁵⁹

b. *Exoneration*

Prior Indiana law did not have any provision regarding exoneration of the attorney-in-fact. The Indiana Power of Attorney Act allows the principal in a power of attorney to state that the attorney-in-fact is only liable if the attorney-in-fact acts in bad faith.⁶⁰ The exoneration is binding on the principal and the principal's successors in interest.⁶¹ This exoneration provision is similar to that recently added to the Indiana Trust Code.⁶²

c. *Conflicts*

Prior Indiana law was silent regarding conflicts the attorney-in-fact may have. The Indiana Power of Attorney Act provides that "an at-

55. IND. CODE § 30-5-6-4(a) (Supp. 1991).

56. *Id.* § 30-5-6-4(b). This provision was adapted from the Minnesota statute which formerly had the provision written in one sentence. See MINN. STAT. ANN. § 523.21 (West 1990).

57. IND. CODE § 30-5-9-1(a) (Supp. 1991).

58. *Id.* § 30-5-9-1(b).

59. *Id.* § 30-5-5-15(c).

60. *Id.*

61. *Id.* § 30-5-9-5.

62. *Id.* § 30-4-3-32.

torney-in-fact who acts with due care for the benefit of the principal is not liable or limited only because the attorney-in-fact also benefits from the act; has an individual or conflicting interest in relation to the property, care, or affairs of the principal; or acts in a different manner with respect to the principal and the attorney-in-fact's individual interest."⁶³ The intent of this provision is to recognize certain situations in which the attorney-in-fact may have conflicts of interest and to establish a different level of "care" with regard to those transactions. The section was adapted from the Illinois provision.⁶⁴

d. Knowledge of status

Prior Indiana law relieved the attorney-in-fact of liability if the attorney-in-fact acted without knowledge of the death of the principal and acted in good faith. A similar provision is contained in the Indiana Power of Attorney Act, which states that the attorney-in-fact is not liable for actions taken under an amended or terminated power of attorney if the attorney-in-fact does not have actual knowledge of the amendment or termination.⁶⁵ Related provisions relieve the attorney-in-fact of liability if the power of attorney is terminated by the incapacity of the principal and the incapacity is unknown to the attorney-in-fact⁶⁶ and if the death of the principal is unknown to the attorney-in-fact.⁶⁷

e. Third party action

Prior Indiana law was silent with respect to the liability of the attorney-in-fact for actions of other persons. The Indiana Power of Attorney Act adapts an Illinois provision which states that the attorney-in-fact is not liable for loss due to an error of judgment or for the act or default of another person.⁶⁸

f. Successor

Prior Indiana law was silent with regard to the liability of a successor attorney-in-fact. The Indiana Power of Attorney Act adapts a section from the Minnesota law that provides that a successor attorney-in-fact is not liable for the actions taken by the previous attorney-in-fact.⁶⁹

63. *Id.* § 30-5-9-2.

64. *See* ILL. REV. STAT. ch. 110, para. 802-7 (Smith-Hurd Supp. 1991).

65. IND. CODE § 30-5-9-3 (Supp. 1991).

66. *Id.* § 30-5-10-3.

67. *Id.* § 30-5-10-4.

68. *Id.* § 30-5-9-4 (adapted from ILL. REV. STAT. ch. 110, para. 802.7 (Smith-Hurd 1991)).

69. *Id.* § 30-5-9-6 (adapted from MINN. STAT. ANN. § 523.14 (West 1990)).

g. Multiple attorneys-in-fact

Prior Indiana law was silent regarding multiple attorneys-in-fact. The Indiana Power of Attorney Act now provides that when one of several attorneys-in-fact does not join in or consent to the action of another, that attorney-in-fact is not liable for the action of the others.⁷⁰ Moreover, "failure to object to an action is not a consent to the action."⁷¹

D. Effective Date

Prior Indiana law generally recognized that a power of attorney may not be effective until the disability or incapacity of the principal.⁷² This became known as the "springing power." The Indiana Power of Attorney Act is more specific. It first states the general rule that the power of attorney is effective when it is signed by the principal.⁷³ It then allows the principal in the power of attorney to specify a specific date or occurrence upon which the power will become effective.⁷⁴

Although this provision allows maximum drafting flexibility, the drafter should be careful to draft the power to become effective upon the occurrence of an event which is objective. For example, a power that is to become effective at the time of the incapacity or disability of the principal relies on a subjective standard. Requiring a written certification from a physician familiar with the principal's affairs stating that the principal is unable to manage the principal's affairs is a more objective standard because it requires the existence of a written document.

E. Powers

1. Fiduciary Limitation.—Prior Indiana law was silent with regard to the limitations placed on the attorney-in-fact in exercising powers given to the attorney-in-fact. The Indiana Power of Attorney Act contains a chapter that is entitled Duties of the Attorney-in-Fact.⁷⁵ Under that chapter, an "attorney-in-fact shall exercise all powers granted under the power of attorney in a fiduciary capacity."⁷⁶ One of the purposes of the provision is to provide a limitation on the use of the powers by the attorney-in-fact to counter arguments that the attorney-in-fact may

70. *Id.* § 30-5-9-7.

71. *Id.*

72. IND. CODE §§ 30-2-11-1 to -7 (repealed 1991).

73. IND. CODE § 30-5-4-2(a) (Supp. 1991).

74. *Id.* § 30-5-4-2(b).

75. *Id.* §§ 30-5-6-1 to -5.

76. *Id.* § 30-5-6-3.

have an ownership interest in the property of the principal, particularly property that the attorney-in-fact may have given to the principal.

2. *Incorporation by Reference.*—Prior Indiana law did not allow incorporation of powers by reference. The Indiana Power of Attorney Act rejects what is known as the statutory form power of attorney. The statutory form power of attorney not only set forth detailed powers but also a form to be used in executing those powers. This allows the use of fill-in-the-blank forms which are sold or submitted to laymen without legal advice.

The Indiana Power of Attorney Act adopts Pennsylvania's incorporation by reference approach. The draftsman may refer to the descriptive language in the section chosen or cite the specific section chosen.⁷⁷ The incorporation by reference is "construed as though the entire section is set out in full in the power of attorney."⁷⁸ Similar or overlapping powers result in the "broadest power controlling."⁷⁹ The "power of attorney may modify any power incorporated by reference."⁸⁰

Unlike the Trust Code, which gives all trusts certain powers unless excluded by the document, the Indiana Power of Attorney Act powers must be specifically incorporated into the document. As a result, all of the powers are optional. Furthermore, there is no requirement that any one power be used. The whole purpose for inclusion of the powers in the statute is to make the draftsman's job easier and hopefully, the power of attorney document shorter.

This raises several problems for the draftsman. First, the draftsman must read the powers in their entirety in order to be able to tell the principal that these are powers the principal wishes to give to an attorney-in-fact. Not only must the draftsman read the powers, but the draftsman must understand the powers.

The draftsman must attempt to make the principal aware of the powers being granted to the attorney-in-fact and subsequently, ensure that the attorney-in-fact is aware of the powers granted. Accordingly, the draftsman should consider submitting to the principal and to the attorney-in-fact a list of the powers incorporated by reference into the power of attorney.

The draftsman should be prepared to exclude or include any matters that specifically need to be added to or removed from the powers. For example, in Indiana Code section 30-5-5-7(a)(3)(A), reference is made to the insurance powers which are incorporated by reference. The statute incorrectly refers to "Section 8" when the reference should be to "Section

77. *Id.* § 30-5-5-1(a).

78. *Id.* § 30-5-5-1(b).

79. *Id.* § 30-5-5-1(c).

80. *Id.* § 30-5-5-1(d).

9” which is the gift power set forth later in the statute. Accordingly, the draftsman can make coordinating changes when the power is incorporated. Similar glitches may exist elsewhere, and the draftsman should be careful before incorporating these powers by reference.

3. *Power of Appointment*.—If the attorney-in-fact can make gifts to himself or in satisfaction of his own legal obligations, the power of attorney may be a general power of appointment.⁸¹ If the power is a continuing one, or not exercisable within a particular period of time, then the annual non-exercise of the power will not be a lapse.⁸²

The possible existence of the power of appointment creates problems if the attorney-in-fact dies holding the power of appointment or the attorney-in-fact makes transfers which exceed more than \$10,000 per year per donee. The gift powers in the Indiana Power of Attorney Act avoid this problem by limiting the amount of the transfer to the attorney-in-fact or in payment of the legal obligations of an attorney-in-fact to the \$10,000 per year per donee gift tax exclusion.⁸³

If it is desired that the attorney-in-fact be able to make gifts to himself or in payment of his legal obligations in excess of this \$10,000 per year, the draftsman may wish to consider different approaches. First, there is a strong argument that a general power of appointment is not created because the power in the power of attorney can only be exercised “in conjunction with the creator of the power.” Under the Internal Revenue Code, if the power is only exercisable in conjunction with the creator of the power it is not a general power.⁸⁴ Arguably, the attorney-in-fact can only exercise the power in conjunction with the principal because the principal can revoke the power at any time.⁸⁵

Other possible approaches include:

1. If the property exceeds \$200,000, consider the adoption of a five percent limitation on the gifts to the attorney-in-fact; five percent of the amount over \$200,000 exceeds \$10,000 allowing a larger gift to the attorney-in-fact.
2. Only allow gifts to the attorney-in-fact or relief of legal obligations of the attorney-in-fact on an ascertainable standard related to health, maintenance, support, or education.
3. Appoint a special agent to make gifts to the attorney-in-fact. Ensure that the special agent is independent and not a permissible donee of any of the gifts.⁸⁶

81. See COLLINS, *supra* note 14, at 68-70.

82. Reg. Sec. 25-2514-3(c)(4).

83. IND. CODE § 30-5-5-9(a)(2) (Supp. 1991).

84. I.R.C. §§ 2041(b)(1)(c)(i), 2514(c)(2) (1988).

85. See COLLINS, *supra* note 14, at 69.

86. See *id.* at 70.

4. Consider a savings clause which invalidates any power that creates an ownership interest on behalf of the attorney-in-fact.

F. Prior Powers of Attorney

Prior powers of attorney remain valid and with increased popularity, new powers of attorney will be more prevalent. The Indiana Power of Attorney Act specifically applies to all powers of attorney created before July 1, 1991, unless the application would cause: (1) an adverse effect on the right given a principal or an attorney-in-fact; (2) the extension of a right not intended to be given at the time the power of attorney was created; (3) the imposition of a duty or liability on a person that was not intended to be imposed; or (4) the relief of a person from a duty or liability imposed by the terms of a power of attorney or the operation of law.⁸⁷ Previously discussed provisions recognize powers created under other acts and even in other states.⁸⁸ This creates a problem of interaction between various powers of attorney, especially where those powers may overlap.

The Indiana Power of Attorney Act is silent on this issue. The draftsman should consider how the new power of attorney interacts with existing powers of attorney. One approach is to revoke all existing powers of attorney. Under the new Act, a revocation contained in a new power of attorney should be sufficient to carry out that task. Nevertheless, that may be too draconian of a strategy. There may exist many little specific powers of attorney related to specific bank accounts or specific mutual funds. As a result, the draftsman may wish to revoke only other general powers of attorney which are not specific as to interests owned by the principal or specific property. Finally, the draftsman may simply wish to let all other existing powers continue; however, when these powers overlap with the new power, have the new power supersede the older powers.

G. Guardian

Prior Indiana law allowed for the nomination of a guardian in a durable power of attorney and required the appointment of the nominee except for good cause or disqualification. The Indiana Power of Attorney Act, borrowing from the Uniform Durable Power of Attorney Act,

87. IND. CODE § 30-5-1-2 (Supp. 1991).

88. See *id.* § 31-5-3-2.

allows the naming of a guardian and requires the appointment except for good cause or disqualification.⁸⁹ The Act goes on to state that the “guardian does not have any power, duty or liability with respect to the property or personal health care conditions that are subject to a valid power of attorney.”⁹⁰ This reverses the prior position in Indiana law which made the attorney-in-fact answer to the guardian. The Indiana Power of Attorney Act states that a guardian has no power to revoke or amend a valid power of attorney unless the court so orders and that such an order cannot be made without a hearing with notice given to the attorney-in-fact.⁹¹

H. Termination

1. *Revocation*.—Prior Indiana law made reference to revoking the power but did not set forth a procedure for revocation. The Indiana Power of Attorney Act states that a “power of attorney may be revoked only by a written instrument” that “identifies the power of attorney revoked” and “is signed by the principal.”⁹² The revocation “is not effective unless the attorney-in-fact or other person” relying on the power of attorney “has actual knowledge of the revocation.”⁹³ Finally, if the executed power of attorney was recorded, the revocation of the power of attorney must be recorded and cross-referenced to the location where the power of attorney is recorded.⁹⁴ Recording requires notarization and preparation statements.⁹⁵

2. *Specific Date*.—Prior Indiana law was silent with regard to the termination of a power of attorney on a specific date. The Indiana Power of Attorney Act now allows the principal to specify a termination date and time.⁹⁶

3. *Durable*.—Prior Indiana law required that the power of attorney contain language indicating that it was to be durable, such as “this power of attorney shall not be affected by subsequent disability or incapacity of the principal or lapse in time” or “this power of attorney shall become effective upon the disability or incapacity of the principal.”⁹⁷ The Indiana Power of Attorney Act adopts the Illinois approach and makes all powers of attorney durable unless stated otherwise in the

89. *Id.* § 30-5-3-4(a).

90. *Id.* § 30-5-3-4(b).

91. *Id.*

92. *Id.* § 30-5-10-1(a).

93. *Id.* § 30-5-10-1(b).

94. *Id.* § 30-5-10-1(c).

95. *Id.* § 30-5-3-3(d).

96. *Id.* § 30-5-10-2.

97. IND. CODE § 30-2-11-1 (repealed 1991).

power of attorney.⁹⁸ If, by its own terms, the power of attorney terminates on the incapacity of the principal, the principal's incapacity does not affect the validity unless the attorney-in-fact or person relying on the power has actual knowledge of the incapacity.⁹⁹

4. *Death*.—The Indiana Power of Attorney Act states that “the power of attorney terminates on the death of the principal.”¹⁰⁰ The death of the principal does not terminate the power until the attorney-in-fact or person relying on the power has actual knowledge of the death.¹⁰¹ A prior provision of Indiana law,¹⁰² concerning notice from the United States Department of Defense of the death of the principal and the fact that a report or listing of missing in action, no longer constitutes notice of death or termination of a power of attorney under the new Indiana Power of Attorney Act.¹⁰³

III. HEALTH CARE POWERS

The new Indiana Power of Attorney Act plays a significant role in expanding the concept of surrogate health care decisionmaking in Indiana. Unfortunately, this is a rapidly changing area with recent developments in both legislation and case law that can cause confusion over the proper role of the power of attorney in this area.

A historical review illustrates that the new Indiana Power of Attorney Act is not the exclusive way of appointing a surrogate health care decisionmaker. Under common law, constitutional law, and other legislative enactments, surrogate health care decisionmakers can be designated in several ways. The Indiana Power of Attorney Act only provides an alternative means for designating such an individual. With the *In re Lawrance* case¹⁰⁴ and its application to the Health Care Consent Act,¹⁰⁵ the health care representative appointment should become the preeminent way to select surrogate health care decisionmakers in Indiana.

A. History

1. *Common Law and Constitutional Law*.—Indiana, like most jurisdictions, recognizes the doctrine of informed consent to medical care.¹⁰⁶

98. IND. CODE § 30-5-10-1 to -4 (Supp. 1991).

99. *Id.* § 30-5-10-3(b).

100. *Id.* § 30-5-10-4(a).

101. *Id.* § 30-5-10-4(b).

102. IND. CODE § 29-2-17-3 (repealed 1991).

103. IND. CODE § 30-5-10-4(c) (Supp. 1991).

104. 579 N.E.2d 32 (Ind. 1991).

105. IND. CODE §§ 16-8-12-1 to -13 (1988 & Supp. 1991).

106. *Kranda v. Houser-Norborg Medical Corp.*, 419 N.E.2d 1024 (Ind. Ct. App. 1981); *Revord v. Russell*, 401 N.E.2d 763 (Ind. Ct. App. 1980); *Joy v. Chau*, 377 N.E.2d 670 (Ind. Ct. App. 1978). See Janet S. Ellis & Linda E. Cantor, *The Right to Refuse Life-Prolonging Medical Care: Common Law and Constitutional Bases*, Elder Law 1991 (1991) (ICLEF) (excellent discussion used extensively in this section).

It is widely recognized that the doctrine of informed consent includes the right to refuse life-prolonging medical treatment.¹⁰⁷ This common-law right has been extended to individuals who are no longer competent, and is exercisable by a surrogate decisionmaker. In fact, many of the recent cases involving right-to-die decisions have involved requests by surrogate decisionmakers for authority from the courts.¹⁰⁸ At the judicial level, the courts often balance the right to terminate life-sustaining medical treatment against the state's interest, which is most often defined as:

- The preservation of life.
- The protection of innocent third parties.
- The prevention of suicide.
- The maintenance of the integrity of the medical profession.

In addition, at least two states, Missouri and New York, require clear and convincing evidence of the incompetent individual's intent with regard to the withholding of life-prolonging procedures.¹⁰⁹

Several state court cases have also found a constitutional right of privacy which allows an individual to control his own medical decisions.¹¹⁰ These cases rely on U.S. Supreme Court cases related to an individual's right to control medical decisions.¹¹¹ In determining the extent of this constitutional right, these courts also refer to the balancing test and the state's interest in the exercise of the common-law right to withhold medical treatment.

Into this mix of common and constitutional law falls the *Cruzan* case.¹¹² Nancy Cruzan, as a result of an automobile accident, was sustained by artificial nutrition and hydration in a persistent vegetative state for seven years. Her parents sought permission from the court to withdraw the artificial nutrition and hydration. As a result of the request, the Missouri court established a clear and convincing evidentiary standard of what Nancy's actual wishes would be under the circumstances. The

107. *Estate of Longeway*, 549 N.E.2d 292 (Ind. Ct. App. 1989); *Brophy v. New England Sinai Hosp.*, 497 N.E.2d 626 (Mass. 1986); *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977); *In re Conroy*, 486 A.2d 1209 (N.J. 1985); *In re Colyer*, 660 P.2d 738 (Wash. 1983).

108. *Saikewicz*, 370 N.E.2d at 417; *In re Haulin*, 689 P.2d 1372 (Wash. 1984).

109. See *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841 (1990); *In re Eichner*, 420 N.E.2d 64, 72 (N.Y. 1981).

110. *Severns v. Wilmington Medical Ctr., Inc.*, 421 A.2d 1334 (Del. 1980); *Guardianship of Barry*, 445 So. 2d 365 (Fla. Dist. Ct. App. 1984); *In re Spring*, 405 N.E.2d 115 (Mass. 1980).

111. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250 (1891).

112. *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. at 2841 (1990).

Cruzans challenged Missouri's clear and convincing standard as unconstitutional.

The United States Supreme Court, through the majority opinion of Justice Rehnquist, found Missouri's clear and convincing standard to be constitutional.¹¹³ In doing so, the majority opinion recognized the common-law doctrine of informed consent and the fact that it encompasses the right to refuse medical treatment.¹¹⁴ The majority opinion also acknowledged that a competent person's right to refuse unwanted medical treatment may be inferred from the prior decisions of the United States Supreme Court.¹¹⁵ In a footnote, Rehnquist explained that the right is more properly analyzed in the terms of the Fourteenth Amendment liberty interest than as a generalized federal right of privacy.¹¹⁶ Rehnquist assumed for the purpose of the case at hand that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition. It should be noted that at least five Justices clearly found a protected liberty interest in refusing artificial nutrition and hydration. Because Nancy Cruzan was no longer competent, the decision to withhold would have to be exercised by a surrogate. The majority of the Supreme Court found that the federal Constitution did not require Missouri to accept the substituted judgment of Nancy's parents.¹¹⁷

Justice O'Connor, in her concurring opinion, made clear that the *Cruzan* decision is very narrow and does not preclude a future determination that the Constitution requires the states to implement the decisions of a patient's duly appointed surrogate.¹¹⁸ In this respect, Justice O'Connor echoed a 1983 report entitled *The Report of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research* which stated, "The Commission found that existing legal procedures be adapted for the purpose of allowing people while competent to designate someone to act in their stead and to express their wishes about treatment."¹¹⁹ The existing procedures referred to are the power of attorney statutes.

On rehearing, Nancy Cruzan's parents were allowed to terminate nutrition and hydration after additional testimony from Nancy's co-workers as to her intent was presented.¹²⁰ Because of the expense of

113. *Id.* at 2852.

114. *Id.* at 2847.

115. *Id.* at 2851.

116. *Id.* at 2851 n.7.

117. *Id.* at 2855.

118. *Id.* at 2858 (O'Connor, J., concurring).

119. *Id.*

120. Ellis & Cantor, *supra* note 106, at 8-9.

litigation in both time and money, and the difficulty of the issues involved in surrogate health care decisionmaking, more and more courts and legislatures have taken steps to remove the courts from this decision-making process. This can be seen in the legislative enactments, including the Indiana Power of Attorney Act.

2. *Uniform Acts*.—Indiana first adopted the durable power of attorney provisions of the Uniform Probate Code and later adopted the Uniform Durable Power of Attorney Act. For years, debate raged as to whether these acts allowed principals to grant powers related to personal health care decisions to the attorney-in-fact. Many argued that the failure to include such rights in the act meant that the health care powers were not delegable to the attorney-in-fact, while others argued that the acts were broad enough to allow such a delegation.

The most recent decision related to this debate is *In re Peters*,¹²¹ in which the New Jersey Supreme Court, in dicta, recognized the ability under the New Jersey Durable Power of Attorney Act to grant medical health care decisionmaking power to the attorney-in-fact, including the power to withhold medical treatment even though it may result in death.¹²²

The National Conference of Commissioners on Uniform Laws, in 1985, adopted the Uniform Rights of the Terminally Ill Act.¹²³ The Act is basically a compilation of existing living will laws. The National Conference of Commissioners on Uniform State Laws is currently working on a Uniform Health Care Power of Attorney. In addition, the Probate Trust & Real Property Section of the American Bar Association also has a division with a committee working on a Model Health Care Act to meet the challenges of surrogate health care decisionmaking.

Most recently, states like Illinois are pioneering health care powers of attorney.¹²⁴ The Illinois Act and similar acts are comprehensive delegations of personal health care decisions including the right to remove or withhold medical treatment even though death may result.

3. *Living Wills*.—In 1985, the Indiana legislature made its first attempt to address the right to die issues that were being raised in the courts.¹²⁵ This attempt was the Living Wills and Life Prolonging Procedure Act (Living Will Act).¹²⁶ From its inception, the Act was recognized

121. 529 A.2d 419 (N.J. 1987).

122. *Id.* at 426.

123. UNIF. RIGHTS OF TERMINALLY ILL ACT, 9B U.L.A. 607 (1982 & Supp. 1991).

124. ILL. REV. STAT. ch. 110 1/2, para. 801-1 to -12 (Smith-Hurd Supp. 1991).

125. See Jeffrey B. Kolb, *Indiana's Living Wills and Life-Prolonging Procedures Act*, 19 IND. L. REV. 284 (1986); Daniel R. Gordon, *Living Wills*, Elder Law 1991 (1991) (ICLEF).

126. IND. CODE §§ 16-8-11-1 to -12 (1988 & Supp. 1991).

as being very narrow in scope. The narrowness was partly due to the compromise reached between the legislature, the Catholic Archdiocese of Indianapolis, and right to life opposition.¹²⁷ Specifically, the definition of life-prolonging procedures which can be removed or withheld does not include nutrition and hydration. Moreover, the obligation of removing life-prolonging procedures falls upon the physician after diagnosing a "terminal condition," which is defined as a "condition caused by injury, disease or illness from which to a reasonable degree of medical certainty: (1) there can be no recovery and (2) death will occur from the terminal condition within a short period of time without the provision of life-prolonging procedures."¹²⁸ The physician must also find that the "patient's death will occur from the terminal condition whether or not life-prolonging procedures are used."¹²⁹ As a result, many doctors may find it difficult to certify to a reasonable degree of medical certainty that the terms and conditions of the living will apply. This is particularly true for an individual in a persistent vegetative state where death would not occur within a short period of time when nutrition and hydration is provided. Indiana's Living Will Act does contain an implied recognition of an attorney-in-fact who may be consulted by the doctor if the doctor does not believe that the living will was properly executed.¹³⁰ This gives some hope that Indiana will recognize surrogate health care decision-making by an attorney-in-fact.

4. *Health Care Consent Act*.—In 1987, Indiana adopted the Model Health Care Consent Act.¹³¹ The Act is designed to allow individuals to appoint a health care representative who may give informed consent to medical treatment in certain circumstances. In the absence of a written delegation, the Act designates individuals who may make those decisions on behalf of others. Prior to the *Lawrance* case, there was debate over whether the Health Care Consent Act allowed the health care representative to remove or withhold medical treatment even though death may result. The Act itself provides: "This Chapter does not affect Indiana law concerning an individual's authorization to make a health care decision for the individual or another individual, or to provide, withdraw, or withhold medical care necessary to prolong or sustain life."¹³² While the *Lawrance* case, discussed below, eventually determined that the Health

127. Kolb, *supra* note 125, at 285.

128. IND. CODE § 16-8-11-9 (1988).

129. *Id.* § 16-8-11-14(a)(1)(B).

130. *Id.* § 16-8-11-14(g).

131. *Id.* §§ 16-8-12-1 to -13. See J. Brian Niederhauser, Indiana's Health Care Consent Law, in Elder Law 1991 (1991) (ICLEF).

132. IND. CODE § 16-8-12-11(a) (1988).

Care Consent Act is broad enough to include the area of medical treatment even though death may result, at the time of the Indiana Power of Attorney Act this issue was unresolved.

5. *Indiana Power of Attorney Act*.—As originally presented to the legislature, the Indiana Power of Attorney Act contained a specific power to be incorporated by reference which would allow the attorney-in-fact to remove or withhold health care based upon the previously expressed preferences of the principal.¹³³ Health care was defined to include the removal or withholding of nutrition and hydration provided by certain intrusive means.¹³⁴ The assumption in the drafting of the Power of Attorney Act was that the Health Care Consent Act was not clearly applicable to surrogate health care decisionmaking when it involved the removal or withholding of nutrition and hydration.

The legislature attempted to coordinate the surrogate health care decisionmaking powers in the Power of Attorney Act with the Health Care Consent Act. As a result, the Health Care Consent Act was amended to incorporate by reference the health care provisions of the Indiana Power of Attorney Act.¹³⁵ The Indiana Power of Attorney Act was changed to give the attorney-in-fact the power to remove or withhold health care only if a separate health care consent representative appointment is made by the principal and attached to the power of attorney.¹³⁶ An additional provision was added to the Indiana Power of Attorney Act, making it clear that the health care representative appointment can be separate from the power of attorney and does not need to be attached.¹³⁷ As a result, the power of attorney health care provisions became inextricably attached to the health care representative appointment under the Health Care Consent Act. Obviously, anyone wishing to make a health care representative appointment needs to do so under the Health Care Consent Act separate from the power of attorney. Nevertheless, some of the provisions of the Indiana Power of Attorney Act may be desirable and may be incorporated into the Health Care Consent Act by attaching the health care representative appointment to the power of attorney as provided by the statute.

6. *Sue Ann Lawrance Case*.—In the *Lawrance* case,¹³⁸ the Indiana Supreme Court recognized Indiana's common-law doctrine of informed consent based on Justice Cardozo's statement that: "Every human being of adult years and sound mind has a right to determine what shall be

133. *Id.* § 30-5-5-17.

134. IND. CODE § 30-5-2-4 (Supp. 1991).

135. *Id.* § 16-8-12-13.

136. *Id.* § 30-5-5-17.

137. *Id.* § 30-5-8-6.

138. *In re Lawrance*, 579 N.E.2d 32 (Ind. 1991).

done with his own body.”¹³⁹ The Indiana Supreme Court reviewed Indiana’s various legislative enactments including the Living Will Act, the new Indiana Power of Attorney Act, and the Health Care Consent Act, and found in these legislative enactments the intent of the legislature to allow the individual the greatest amount of patient autonomy even when the patient becomes incompetent.¹⁴⁰ The Indiana Supreme Court focused on the Health Care Consent Act and determined that the definition of “health care” under the Act is broad enough to include the provision of nutrition and hydration.¹⁴¹ In support, the court relied on various common-law decisions from other jurisdictions and legislative enactments such as the Indiana Power of Attorney Act.¹⁴² Accordingly, Indiana’s Health Care Consent Act, with its automatic designation of the surrogate health care decisionmaker or its provisions allowing the designation of a surrogate health care decisionmaker, provides the broadest relief of any jurisdiction in the country when it comes to surrogate health care decisions. The Indiana Supreme Court clearly states its belief that courts should no longer be involved in cases where the Health Care Consent Act has designated who should make these decisions.

B. Requirements

1. Health Care Representative Appointment.—The attorney-in-fact in a power of attorney may be given seven specific powers related to personal health care and medical decisions.¹⁴³ These powers are independent of a health care representative appointment. However, if the attorney-in-fact is an individual who wishes to consent or refuse health care for the principal, the principal must execute and attach either a declaration under the living will statute or a health care representative appointment to the power of attorney.¹⁴⁴ Similar language is contained in Indiana Code section 30-5-5-17, which states: “To empower the attorney-in-fact to act under this section the following language must be included in an appointment under IC 16-8-12 in substantially the same form set forth below.”¹⁴⁵ Language must be added to a health care representative appointment and attached to the power of attorney for the attorney-in-fact to have authority to refuse or consent to health care. The power of attorney and health care representative appointment can be executed separately.

139. *Id.* at 38-39.

140. *Id.* at 39.

141. *Id.*

142. *Id.* at 39-40.

143. IND. CODE § 30-5-5-16 (Supp. 1991).

144. *Id.* § 30-5-5-16(b)(2).

145. *Id.* § 30-5-5-17.

2. *Principal*.—The principal of a power of attorney must be an adult and be able to act in a legal capacity.¹⁴⁶ Indiana's Health Care Consent Act allows a consent to health care to be signed by an adult or a minor who is either emancipated, fourteen years of age, not dependent on the parent for support, married, in the military service of the United States, or authorized to consent to the health care by any other statute.¹⁴⁷ Certain minors can appoint a health care representative for health care but may not appoint an attorney-in-fact to take care of the minor's property.¹⁴⁸

3. *Formalities*.—A health care representative appointment must be in writing, signed by the appointor or by a designee in the appointor's presence, and witnessed by an adult other than the representative.¹⁴⁹ These requirements differ from the power of attorney formalities which include the grant of a power, identification of the attorney-in-fact, and notarization.¹⁵⁰

C. Health Care Representative

1. *Qualification*.—A health care representative can only be an individual.¹⁵¹ An attorney-in-fact can be an individual, corporation, partnership, or trust.¹⁵² A corporation, partnership, or trust should not be named as attorney-in-fact if the right to refuse medical treatment is included.

2. *Multiple or Successor Attorneys-in-Fact and Compensation*.—The Health Care Consent Act is silent with regard to multiple or successor health care representatives. It is also silent regarding compensation for a health care representative. If the attorney-in-fact is also appointed as health care representative in a manner contemplated by the Indiana Power of Attorney Act (the health care representative appointment is attached to the power of attorney), it appears that the law implicitly recognizes multiple and successor health care representatives also serving as attorney-in-fact. It also suggests that compensation would be allowed under the Indiana Power of Attorney Act.

3. *Duties*.—The attorney-in-fact who is also a health care representative has the duty of ascertaining whether or not the principal notified the principal's health care providers that a power of attorney has been

146. *Id.* § 30-5-2-6.

147. IND. CODE § 16-8-12-2 (1988).

148. *Id.* § 16-8-12-4.

149. *Id.* § 16-8-12-6(c).

150. IND. CODE § 30-5-4-1 (Supp. 1991).

151. IND. CODE § 16-8-13-1(5) (1988).

152. IND. CODE § 30-5-2-6 (Supp. 1991).

executed.¹⁵³ The intent of the statute is to place any health care representative appointment with the language on withholding medical treatment in the medical record of the principal. The Power of Attorney Act states that if the power of attorney is not in the medical record, it is the duty of the attorney-in-fact to notify the health care providers of the existence of the power.¹⁵⁴ Again, this does not apply to all powers of attorney but to powers of attorney with this specific provision regarding withholding medical treatment.

There is no duty on the attorney-in-fact to act in the Indiana Power of Attorney Act.¹⁵⁵ The Health Care Consent Act states that if the health care representative is unwilling to act, the health care representative should inform the appointor, the appointor's legal representative, and the health care provider.¹⁵⁶ These provisions may not be conflicting, but are not necessarily coordinated.

4. *Liability.*—The Indiana Power of Attorney Act states that the attorney-in-fact is only liable under the health care powers if the attorney-in-fact acted in bad faith.¹⁵⁷ The Indiana Health Care Consent Law requires that a health care representative “act in the best interest of the appointor consistent with the purpose expressed in the appointment and in good faith.”¹⁵⁸ It appears that the two provisions agree though they come at the problem from opposite directions. In addition, the Health Care Consent Law states that a health care representative “does not become personally liable for the cost of health care by virtue of that consent.”¹⁵⁹

D. Effective Date

A health care representative appointment becomes effective when the appointor is incapable of consenting.¹⁶⁰ This is different from the power of attorney which allows a specification of the effective date.¹⁶¹

E. Powers

There are seven health care powers which can be included in a power of attorney¹⁶² or which are automatically part of a health care

153. *Id.* § 30-5-6-5(f).

154. *Id.*

155. *Id.* § 30-5-6-1.

156. *Id.* § 16-8-12-6(i).

157. *Id.* § 30-5-9-1(b).

158. IND. CODE § 16-8-12-6(h) (1988).

159. *Id.* § 16-8-12-11(g).

160. *Id.* § 16-8-12-6(f).

161. IND. CODE § 30-5-4-2(b)(1) (Supp. 1991).

162. *Id.* § 30-5-5-16.

representative appointment.¹⁶³ The power to remove or withhold health care is contained in the Indiana Power of Attorney Act in language to be incorporated specifically into the health care representative appointment.¹⁶⁴ The power authorizes the withholding or withdrawal of health care which is defined to include nutrition and hydration provided by certain intrusive means.¹⁶⁵

Both the Indiana Power of Attorney Act and the Health Care Consent Act allow for the delegation of powers including health care powers.¹⁶⁶ The Indiana Power of Attorney Act states that if the attorney-in-fact makes an anatomical gift, authorizes an autopsy, or directs disposition of the principal's body, the acts of the attorney-in-fact shall be considered the acts of the principal or of the person who has priority under law to make the necessary decisions; each person to whom the attorney-in-fact communicates a direction shall comply with the direction.¹⁶⁷ This unusual section is directed at the problem caused by the common-law and statutory requirement that the power of attorney terminate at death. This legislative abrogation of common law makes decisions related to these three instances effective even after the death of the principal. Arguably, it may even make the decisions effective if the decisions are made after the death of the principal.

F. Health Care Provider

The Health Care Consent Act incorporates by reference the health care consent provisions of the new Indiana Power of Attorney Act except to the extent they conflict with the Health Care Consent Act.¹⁶⁸ This incorporation by reference probably includes the provisions in the new Indiana Power of Attorney Act related to the health care provider's duties and liabilities.¹⁶⁹ A health care provider may be more comfortable if the protections of the new Indiana Power of Attorney Act clearly apply.

1. Duties.—The Indiana Power of Attorney Act sets forth specific duties for a health care provider. The health care provider furnished with a copy of a living will or a health care representative appointment is required to make the documents a part of the principal's medical records.¹⁷⁰ Any change is also to be noted.¹⁷¹

163. *Id.* § 16-8-12-13(a).

164. *Id.* § 30-5-5-17.

165. *Id.* § 30-5-2-5-4.

166. *Id.* §§ 30-5-5-18, 16-8-12-5.

167. *Id.* § 30-5-7-6.

168. *Id.* § 16-8-12-13.

169. *Id.* § 30-5-9-10.

170. *Id.* § 30-5-7-2.

171. *Id.*

The health care provider is required to consult with the attorney-in-fact who has power to act for the patient under a living will or health care representative appointment or power of attorney if the health care provider "believes a patient may lack the capacity to give informed consent to health care the provider considers necessary."¹⁷²

A health care provider must comply with the health care decision made by an attorney-in-fact under a power of attorney once the decision is communicated. The health care provider can continue to administer for the principal's comfort, care, or alleviation of pain. If the health care provider is unwilling to comply, the health care provider must notify the attorney-in-fact of the provider's unwillingness and properly take all steps necessary to transfer the responsibility of the principal's health care to another health care provider designated by the attorney-in-fact.¹⁷³

Finally, the health care provider must give the attorney-in-fact the same access the principal has to examine and copy medical records, though the expenses are paid by the principal and are subject to reasonable rules to prevent disruption of the principal's health care.¹⁷⁴

2. *Liability*.—A health care provider who acts in good faith reliance on a direction or decision of an attorney-in-fact that is not clearly contrary to the terms of the power of attorney is protected and released from liability to the same extent as the provider or other person who would be protected or released if the provider or other person had dealt directly with the principal as a fully competent person. Specifically, the health care provider is not subject to civil or criminal liability or discipline for unprofessional conduct even if death or injury results to the principal. The provider is not subject to civil or criminal liability or discipline if his failure to comply with the direction is substantially in accord with the reasonable medical standards at the time and the provider promptly transfers the principal to another health care provider, and the death is not suicide or homicide if it results from the withholding or withdrawing of health care in accordance with the terms of the power of attorney and does not impair or invalidate an insurance annuity or other type of contract that is conditioned on the life or death of the principal, term of the contract notwithstanding.¹⁷⁵

IV. THIRD PARTIES

One of the primary concerns with any power of attorney is whether third parties will rely on it. One of the strengths of the Indiana Power

172. *Id.* § 30-5-7-3.

173. *Id.* § 30-5-7-4.

174. *Id.* § 30-5-7-5.

175. *Id.* § 30-5-9-10.

of Attorney Act are provisions increasing the reliance by third parties on the power.

A. Binding Effect

Prior Indiana law provided that the acts of the attorney-in-fact bound the principal and principal successors in interest as though the principal had acted on the principal's own behalf.¹⁷⁶ The Indiana Power of Attorney Act continues the same rule which was adapted from prior Indiana law.¹⁷⁷

B. Presumptions

The Indiana Power of Attorney Act creates a presumption of validity where the written power of attorney is purported to be signed by the principal unless anyone relying on the power has actual knowledge that the power was not validly executed.¹⁷⁸ The Power of Attorney Act goes on to state that the "signature of the attorney-in-fact that identifies the principal and the attorney-in-fact, or a similar written disclosure, is an attestation and is conclusive proof to a party relying on the attestation, except a party with actual knowledge that the attestation is false, that

- the principal was competent at the time the power was executed;
- the attorney-in-fact does not have actual knowledge of the termination of the power of attorney;
- in the case of a successor attorney-in-fact, the original attorney-in-fact has failed or ceased to serve, and the successor attorney-in-fact is empowered to act on behalf of the principal; and
- if the effective date of the power of attorney begins upon the occurrence of a certain event, that event has occurred and the attorney-in-fact is able to act under the power of attorney.¹⁷⁹

C. No Duty to Investigate

A third party relying on a power of attorney and attestation of the attorney-in-fact is not required to investigate whether the power of attorney is valid, "whether the attorney-in-fact is authorized to act, [or]

176. IND. CODE § 30-2-11-2 (repealed 1991).

177. IND. CODE § 30-5-8-1 (Supp. 1991).

178. *Id.* § 30-5-8-2.

179. *Id.* § 30-5-8-3.

what the attorney-in-fact does with the property delivered to the attorney-in-fact.”¹⁸⁰

D. Copy

Unique to power of attorney law is the Indiana provision that “a copy of the power of attorney has the same force and effect as the original if the attorney-in-fact certifies that the copy is a true and correct copy.”¹⁸¹

E. Liability

Perhaps the most important provision of the Indiana Power of Attorney Act is the provision that “a person refusing to accept the authority of an attorney-in-fact . . . is liable to the principal and to the principal’s heirs, assigns and the personal representative of the estate of the principal in the same manner as a person would be liable had the person refused to accept the authority of the principal to act on the principal’s own behalf.”¹⁸² This provision does not apply to someone who has actual notice of the revocation of the power of attorney or the duration of the power has expired as specified in the power of attorney or “the person has actual knowledge of the death of the principal.”¹⁸³ The provision “does not negate the liability a person would have to the principal or the attorney in fact under another form of power of attorney, under the common law, or otherwise.”¹⁸⁴

For protection, a good faith purchaser is not liable to the principal or heirs. The person accepting the authority of an attorney-in-fact is not liable to the principal or heirs of the principal if the person had no actual notice of revocation, the person had no actual notice of the death of the principal, or the person had no actual notice that the duration of the power of attorney specified in the power of attorney had not expired.¹⁸⁵

V. GENERAL RULES

A. Construction

The Indiana Power of Attorney Act provides a rule of construction that requires that “[t]he rules of law contained in the article shall be

180. *Id.* § 30-5-8-4.

181. *Id.* § 30-5-8-5.

182. *Id.* § 30-5-9-9(a).

183. *Id.* § 30-5-9-9(b).

184. *Id.* § 30-5-9-9(c).

185. *Id.* § 30-5-9-8.

interpreted and applied to the terms of a power of attorney to implement the intent of the principal and the purposes of the power of attorney. If the law conflicts with the terms of the power of attorney, the terms of the power of attorney control unless the law clearly prohibits or restricts what the power of attorney purport to authorize.”¹⁸⁶

B. Recording

Prior Indiana Law required that a power of attorney be recorded prior to the time that the attorney-in-fact executed the document to be recorded. The new Indiana Power of Attorney Act states that a power of attorney does not need to be recorded, but that if it is to be recorded, it should be recorded before the document to be recorded is presented and that the power of attorney comply with the recording requirements including notary and preparation statements. The power of attorney should be cross-referenced to the document executed by the attorney-in-fact.¹⁸⁷

C. Court Guidance

Similar to the Trust Code, any interested person may ask the probate court to construe a power of attorney and then instruct the attorney-in-fact.¹⁸⁸ Notice of a hearing on such a petition must be as the court directs.¹⁸⁹ This allows any interested person to seek court substituted judgment in situations in which the attorney-in-fact may not wish to act without such instruction.

VI. CONCLUSION

The new Indiana Power of Attorney Act is evolutionary, not revolutionary. It borrows from existing power of attorney acts and expands and pushes forward the concept of a power of attorney which remains effective until the death of the principal. It is not the last word in power of attorney acts; however, it is conceivable that uniform acts will soon be developed which are preferable to this Act.

186. *Id.* § 30-5-3-1.

187. *Id.* § 30-5-3-3.

188. *Id.* § 30-5-3-5.

189. *Id.*

Recent Developments in Property Law

WALTER W. KRIEGER*

I. ADVERSE POSSESSION

In order to acquire title to land by adverse possession, the possession must be actual, visible, notorious, exclusive, under claim of ownership, hostile to the true owner, and continuous for the ten year statutory period.¹ In addition, in Indiana, the claimant must have paid all taxes and special assessments falling due during the period the land was possessed adversely.² Several decisions decided during this survey period discuss in detail the "elements" of adverse possession.³

In *Davis v. Sponhauer*,⁴ the Sponhauers owned a lot with a cottage and boat house on Lake Wawasee. The land was bordered on the south and east by lake channels and on the west by Davis's land. A large portion of the disputed area was originally a roadway, thought to be the boundary between the Sponhauer and Davis properties. The parties' predecessors-in-interest vacated the roadway in 1957. From 1973 to 1977, a gravel lot in the disputed area was used by the Sponhauers and the Vances (Davis's predecessor-in-interest) for parking their vehicles. In 1977, the Sponhauers and the Vances blacktopped the gravel area, each paying half the cost. The Sponhauers maintained the blacktopped area after that time. In addition to parking their vehicles on the blacktopped lot, the Sponhauers and the Vances used the area for basketball and other activities.

When Davis acquired title in 1986, a survey required by Davis's lender revealed that the platted boundary ran along the eastern edge of the vacated road. Until this time everyone believed the boundary line ran through the middle of the blacktopped parking area. In 1989, relations between the Sponhauers and Davis began to deteriorate, and when Davis

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1. *Estate of Mark v. H.H. Smith Co.*, 547 N.E.2d 796, 799 (Ind. 1989). Indiana Code § 34-1-2-2(6) (1988), establishes a 10 year statute of limitation for the recovery of real estate.

2. IND. CODE § 32-1-20-1 (1988).

3. In addition to the two decisions discussed under this topic, the reader may wish to examine the discussion of the acquisition of a prescriptive easement by adverse use discussed *infra* notes 26-31 and accompanying text.

4. 574 N.E.2d 292 (Ind. Ct. App. 1991)

erected a fence six inches west of the platted boundary, the Sponhauers brought an action to quiet title.⁵ The trial court found that the Sponhauers had acquired title by adverse possession and by a property line agreement.⁶

On appeal, Davis argued that the Sponhauers failed to prove the common-law and statutory elements of adverse possession. First, Davis argued that the Sponhauers' possession was not open and notorious. The court observed that "notorious possession" is possession so conspicuous that it is known or talked about by people in the vicinity of the premises. It must be such "that the owner ought to have known that a stranger was asserting dominion over his land."⁷

In reviewing the record, the court noted that the Sponhauers had parked their vehicles in the disputed area since 1957 and that they and the Vances had agreed to blacktop the area, splitting the cost. In addition, the Sponhauers had placed a pier, constructed a birdhouse, and done landscaping in the disputed area. Neighbors testified to their understanding of the location of the property line based upon the Sponhauers' use of the property. The court found that the Sponhauers' use was more than "casual maintenance" which the Indiana courts have found to be insufficient to support a claim of adverse possession.⁸

Davis also argued that the Sponhauers' possession was not exclusive.⁹ The court responded by pointing out that from 1973 until 1986 the Sponhauers and the Vances recognized the property line as running approximately through the middle of the blacktopped area and that those renting the cottage from the Sponhauers parked their vehicles on the east part of the lot.¹⁰

Next, Davis claimed that the Sponhauers' possession was not hostile or adverse to the Vances. The court acknowledged that "the claim of

5. The Sponhauers also sued for slander of title, injunctive relief, damages, and attorney's fees; however, these issues are beyond the scope of this survey.

6. *Davis*, 574 N.E.2d at 299. Both the Vances and the Sponhauers were shown the boundary line between the two properties by the Claytons (Sponhauers's predecessor-in-title) in 1973. Vance testified that he had an understanding with the Sponhauers as to the location of the property line and the court found that the sharing of the costs of improving the blacktopped area was further evidence of the agreement. The trial court placed the property line where the Sponhauers and the Vances agreed that it was located.

7. *Id.* at 297 (quoting *McCarty v. Sheets*, 423 N.E.2d 297, 301 (Ind. 1981)).

8. *Id.* at 297-98. Periodic or sporadic acts of ownership in a disputed area are not sufficient to establish adverse possession. *See, e.g.*, *Beaver v. Vandall*, 547 N.E.2d 802, 803 (Ind. 1989); *McCarty v. Sheets*, 423 N.E.2d 297, 300 (Ind. 1981); *Green v. Jones*, 490 N.E.2d 776, 779 (Ind. Ct. App. 1986).

9. Exclusive possession is possession of such a character that it operates as an ouster of the owner of legal title. *Beaver*, 547 N.E.2d at 804 (quoting *Philbin v. Carr*, 129 N.E. 19, 28 (Ind. Ct. App. 1920)).

10. *Davis v. Sponhauer*, 574 N.E.2d 292, 298 (Ind. Ct. App. 1991).

ownership must be based on some ground justifying the adverse claimant's belief that he is the owner, and that claim must be communicated to the true owner."¹¹ Here, however, the court observed that the Sponhauers and the Vances were both shown what was believed to be the boundary line between the two properties by the Claytons, the Sponhauers' predecessors-in-interest, and Mr. Vance and his son testified that the Sponhauers' use of the property was consistent with the boundary line as they believed it to exist. It was under a claim of right which was clearly communicated to the true owner. The court further remarked that even if it believed Davis's claim that on a few occasions after 1989 the Sponhauers requested his permission to use the disputed area, it would be irrelevant because title had already vested in the adverse claimant.¹²

Davis also contended that the Sponhauers failed to pay the taxes on the disputed area during the statutory period as required by Indiana Code section 32-1-20-1. In response, the court observed that the Indiana courts have not applied this statute in cases involving boundary line disputes. The purpose of the statute was to provide the owner with notice that someone had paid the taxes on the land and was claiming an interest in the property. In the case of a boundary line dispute, however, both parties pay the taxes on their part of the property and the improvements thereon. Thus the statute would not give notice to the record owner of the claim.¹³

Finally, Davis maintained that assuming *arguendo* that the Sponhauers had proven the elements of adverse possession, their claim to the disputed area must fail because they could not establish the quantity of the land involved.¹⁴ In rejecting this contention, the court observed that the Claytons, the Sponhauers' predecessor-in-interest, pointed out the boundary line to both the Sponhauers and the Vances, and it was not error for the trial court to use this evidence to determine the quantity of the land.¹⁵

In *Snowball Corp. v. Pope*,¹⁶ the court once again addressed the elements of adverse possession. The Snowball Corporation owned ap-

11. *Id.* (citing *Estate of Mark v. H.H. Smith Co.*, 547 N.E.2d 796 (Ind. 1989)).

12. *Id.* (citing *Kline v. Kramer*, 386 N.E.2d 982, 987 (Ind. Ct. App. 1979)).

13. *Id.* at 298-99 (quoting *Kline v. Kramer*, 386 N.E.2d 982, 989 (Ind. Ct. App. 1979)).

14. A number of Indiana decisions have held that the claim must be limited to that portion over which the claimant exercises continuous acts of ownership and that "where the quantity is small the rule as to the location of the line is exacting." *McCarty v. Sheets*, 423 N.E.2d 297, 300 (Ind. 1981). *See also* *Carter v. Malone*, 545 N.E.2d 5, 7 (Ind. Ct. App. 1989).

15. *Davis v. Sponhauer*, 574 N.E.2d 292, 299 (Ind. Ct. App. 1991).

16. 580 N.E.2d 733 (Ind. Ct. App. 1991).

proximately 8,000 square feet of land in Brownsburg, Indiana, which at one time was a swamp. The swamp was filled in by the Popes in 1957 and became an extension of the lawn at their residence. Snowball brought an action to quiet title to the unimproved tract of land, and the Popes counterclaimed under the theory of adverse possession.

On appeal from a judgment in favor of the Popes, Snowball argued that because it was unaware of its ownership of the disputed tract, its lack of knowledge should prevent the ten year statute of limitations from running. Snowball cited two cases in support of this argument, both of which the court found inapposite. The cases involved situations in which the true owners were unaware of the adverse activities on the land, not situations in which the owners were unaware of their interests in the land itself.¹⁷ The court concluded that if it tolled the ten year statute of limitations simply because the true owner was unaware of its interest in the land "the entire doctrine of adverse possession would be abrogated."¹⁸

Snowball next contended that the Popes failed to establish that their possession was sufficiently notorious, exclusive, and open and visible to satisfy the elements of adverse possession. With regard to Snowball's contention that the Popes' possession was not "notorious," the court observed that the reason for requiring that the possession be "notorious" is that the true owner will be alerted that a stranger is asserting a claim to his land. The court then defined the term as possession "so conspicuous that it is generally known and talked of by the public—at least by people in the vicinity of the premises."¹⁹ Here, several residents of Brownsburg testified that they believed the tract belonged to the Popes. In fact, the Brownsburg Town Board required the Popes to fill in the swamp located on the land. Thus, the trial court was not in error in finding the possession to be notorious.²⁰

With regard to the argument that the possession was not exclusive, the court observed that exclusive means claiming the title to the exclusion of others: "The possession must be exclusive also as against persons other than the owner of legal title; and where the claimant occupies the land in common with third persons, or with the public generally, the

17. In *Marengo Cave Co. v. Ross*, 10 N.E.2d 917 (Ind. 1937), the possessor's activities in an underground cave were not observable by the surface owner, and in *Able v. Love*, 143 N.E. 515 (Ind. Ct. App. 1924), the issue was whether the possession met the elements requisite for adverse possession.

18. *Pope*, 580 N.E.2d at 735 (citing *Craven v. Craven*, 103 N.E. 333, 335 (Ind. 1913) (holding that the mere fact the true owner is unaware of his rights to the land will not prevent the statute of limitations from running)).

19. *Id.* (quoting *McCarty v. Sheets*, 423 N.E.2d 297, 301 (Ind. 1981)).

20. *Id.*

possession is not such exclusive possession as will constitute the basis of title.”²¹ Snowball argued that the Popes had failed to prove exclusive possession because children ice skated on the swamp in the winter, pedestrians were allowed to walk across the property on their way to a nearby restaurant, and there were no fences or “no trespassing” signs. The court found these facts “irrelevant” because these activities did not suggest that the Popes intended to share the ownership to the land, but rather, if anything, it suggested a license had been granted.²²

Next, the court addressed the element of “open and visible” possession, which requires that the possession be of such a nature and character as to apprise the world that the land is being occupied and by whom. The purpose of this element is to provide the true owner with notice that someone has taken possession and is claiming ownership of the land.²³ Snowball claimed that the Popes did nothing to the land other than cut the grass. The court observed that the nature and character of the land must be considered when determining the sufficiency of the acts of ownership. Here, the swamp was not completely filled and the area was not spacious enough for much development. In short the court found the land was not suited for most purposes and that the use was consistent with the nature of the land.²⁴ The court concluded that the use by the Popes met the requirements for adverse possession and affirmed the judgment of the trial court.²⁵

II. EASEMENTS

A. *By Prescription*

A prescriptive easement can be established by showing actual, hostile, open, notorious, continuous, uninterrupted, and adverse use for a period of twenty years under a claim of right or such continuous, adverse use with the knowledge and acquiescence of the owner.²⁶

In *Larch v. Larch*,²⁷ William Larch and DMB Agricorp, Inc. (DMB) brought suit to quiet title to a drainage tile connection on adjoining

21. *Id.* at 736 (quoting *Philbin v. Carr*, 129 N.E. 19, 28 (Ind. Ct. App. 1920)).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. IND. CODE § 32-5-1-1 (1988); *Greenco, Inc. v. May*, 506 N.E.2d 42, 45 (Ind. Ct. App. 1987); *Searcy v. LaGrotte*, 372 N.E.2d 755, 757 (Ind. Ct. App. 1978).

27. 564 N.E.2d 313 (Ind. Ct. App. 1990).

land owned by Ruth Larch, Edward Larch, and Velma Barrett. The trial court granted partial summary judgment in favor of DMB, finding that DMB had acquired a prescriptive easement.²⁸

On appeal, the defendants argued that the use of the tile by DMB was "permissive." While recognizing that the use of land with the permission of the owner is insufficient to establish an easement by adverse use, the court observed that "[o]nce open and continuous use of another's land commences with knowledge on the part of the owner, such use is presumed to be adverse to the owner."²⁹ Deposition testimony indicated that DMB had connected the tiles in 1947 and that the defendants' predecessor-in-title was present, saw DMB make the connection, and did not object. No evidence was introduced to rebut the presumption that the use was adverse.

The defendants further argued that DMB did not acquire a prescriptive easement because DMB failed to pay taxes on the easement, citing Indiana Code section 32-1-20-1, which provides the following:

[I]n any suit to establish title to lands or real estate no possession thereof shall be deemed adverse to the owner . . . unless such adverse possessor or claimant shall have paid and discharged all taxes and special assessments of every nature falling due on such lands or real estate during the period he claims to have possessed the same adversely.³⁰

In rejecting the defendants' argument, the court noted that the explicit language of the statute limits its application to suits to acquire "title to lands" by adverse possession. The court could find no case applying the statute to a suit to establish an easement and affirmed the trial court's granting of partial summary judgment.³¹

B. By Implication

Implied easements can arise in different situations. First, an implied easement can arise from a prior use of the property:

Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which at the time of the severance is in use, and is reasonably necessary for the fair enjoyment of the other, then, upon a severance of such ownership . . . there arises by impli-

28. *Id.* at 315.

29. *Id.* at 317.

30. IND. CODE § 32-1-20-1 (1988).

31. *Larch*, 564 N.E.2d at 317.

cation of law a grant or reservation of the right to continue such use.³²

If the benefited portion of the land is conveyed to the grantee, the right to continue the use of the part of the land retained by the grantor is called an implied grant. If the grantor retains the benefited portion of the land, the right of the grantor to continue to use the part of the land conveyed to the grantee is called an implied reservation.³³ Implied grants are favored by the law because they benefit the land being conveyed, and most courts require that the continued use be only a reasonable necessity to the enjoyment of the dominant estate. Implied reservations, on the other hand, are not favored by the law because they burden the land being conveyed.³⁴

A second situation in which an easement by implication may arise, regardless of any prior use of the land, is by way of necessity to prevent a tract of land from becoming landlocked. When the conveyance of a portion of the land would result in either the part being conveyed or the portion retained by the grantor becoming landlocked, the court will imply a way of necessity across the other portion of the land to reach a public highway.³⁵ Most cases require strict necessity to impose an implied way of necessity across the land of another.³⁶ Scholars have warned that a failure to distinguish between the implied easement by necessity and the implied easement based on prior use when discussing the requirement of necessity "can lead to a confusion of tongues."³⁷ Despite this warning, the Indiana courts have consistently used the phrase "way of necessity" to describe both types of implied easements.³⁸ The Indiana courts continue to state that when there is an obvious and permanent servitude on one part of the land at the time ownership is severed, an easement will be implied if the use is reasonably necessary

32. *John Hancock Mut. Life Ins. Co. v. Patterson*, 2 N.E. 188, 191 (Ind. 1885). See also *Shandy v. Bell*, 189 N.E. 627 (Ind. 1934); *Searcy v. LaGrotte*, 372 N.E.2d 755 (Ind. Ct. App. 1978); *Krueger v. Beecham*, 61 N.E.2d 65 (Ind. Ct. App. 1945). For a discussion of the implied easement based on prior use, see ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 8.4, at 444-46 (1984).

33. JOHN E. CRIBBET & CROWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 371-72 (3rd ed. 1989).

34. *Id.* at 372. See also CUNNINGHAM, *supra* note 32, § 8.4, at 446.

35. See, e.g., *Shandy v. Bell*, 189 N.E. 627 (Ind. 1934); *Dudgeon v. Bronson*, 64 N.E. 910 (Ind. 1902). For a discussion of the implied way of necessity, see CUNNINGHAM, *supra* note 32, § 8.5, at 447-49.

36. CRIBBET & JOHNSON, *supra* note 33, at 371-72.

37. JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 848 (2d ed. 1988).

38. See, e.g., *McConnell v. Satterfield*, 576 N.E.2d 1300 (Ind. Ct. App. 1991); *Hunt v. Zimmerman*, 216 N.E.2d 854 (Ind. Ct. App. 1966); *Krueger v. Beecham*, 61 N.E.2d 65 (Ind. Ct. App. 1945).

for the fair enjoyment of the part benefited.³⁹ However, the meaning of "reasonably necessary" appears to be restricted by the use of the phrase "way of necessity" to describe the easement. This confusion of tongues is dramatically illustrated in *McConnell v. Satterfield*.⁴⁰

In 1972, the Satterfields, who owned lots A and B, built a garage on the northern portion of lot B and constructed a driveway across lot A leading to the side of the garage. In 1986, the Satterfields divorced and Margaret became the owner of the two lots. The McConnells bought lot B at a sheriff's sale in 1989. At the time, they were aware that the driveway was on lot A, but they continued to use it to reach the garage, despite Satterfield's objection. Satterfield constructed a fence to prevent the McConnells from using the driveway, and when the McConnells tore down the fence, Satterfield brought an action for damages, ejectment, and to quiet title. The McConnells counterclaimed, alleging an implied easement by necessity. The trial court found for Satterfield and against the McConnells on their counterclaim.⁴¹

On appeal the court made the following observation:

Generally, an easement will be implied where during the unity of title, an owner imposes an apparently permanent and obvious servitude on one part of the land in favor of another part, and the servitude was in use when the parts were severed, if the servitude is reasonably necessary for the fair enjoyment of the part benefited.⁴²

Here, the driveway was the only way to reach the garage. The McConnells would be required to tear out part of the pool deck and retaining wall or construct the driveway over a septic system. Nevertheless, the court found that the easement was not necessary:

The requirement of reasonable necessity does not do away with the requirement that some necessity be shown. The McConnells admit that they are not landlocked and that they have means of access to their lot from the southern side which fronts on a public highway. The McConnells acknowledge that Indiana

39. See, e.g., *John Hancock Mut. Life Ins. Co. v. Patterson*, 2 N.E. 188 (Ind. 1885); *Shandy v. Bell*, 189 N.E. 627 (Ind. 1934); *Searcy v. LaGrotte*, 372 N.E.2d 755 (Ind. Ct. App. 1978); *Hunt v. Zimmerman*, 216 N.E.2d 854 (Ind. Ct. App. 1966); *Krueger v. Beecham*, 61 N.E.2d 65 (Ind. Ct. App. 1945).

40. 576 N.E.2d 1300 (Ind. Ct. App. 1991).

41. *Id.* at 1301.

42. *Id.* at 1302.

has not granted a way of necessity when only a portion of the land is inaccessible.⁴³

The court then cited *Hunt v. Zimmerman*⁴⁴ for the rule that a right of way by necessity cannot apply to property which is already accessible to the landowner.⁴⁵ In *Hunt*, the court refused to find an implied easement across the back yard of the land retained by the grantor even though the garage on the grantee's lot opened onto the land retained by the grantor and, because of the shape of the grantee's lot, the garage could not be reached by car except across the land retained by the grantor. In refusing to find an implied easement the court remarked that the lot itself was accessible from the street:

A right of way by necessity cannot apply to property which is already accessible to the landowner. . . . It may be true that he had no ingress or egress for the use of his garage in the manner for which it had been designed, but this is not our concern. We are concerned only with the land as a whole, and not as to the use of a particular building located on the land.⁴⁶

In light of the language in *Hunt*, it is not surprising that the court in *McConnell* came to the conclusion that there was no implied easement to use the driveway. What is not clear, in light of these Indiana decisions, is the meaning of the phrase "reasonable necessity." The decisions suggest that there is little if any distinction between the necessity required for a way of necessity and that required for an implied easement based on prior use.

C. Riparian Rights

There were three reported cases during this survey period dealing with the riparian rights of access easement holders. In *Klotz v. Horn*,⁴⁷ the Horns, who owned a single tract of land abutting Eagle Lake, conveyed the rear portion of the lot, which did not abut the lake, to Nedra Sainer in 1975. The deed granted Sainer a six foot wide easement appurtenant "for the purpose of access to Eagle Lake." Ten years later Sainer conveyed her tract to the Klotzes, who subsequently erected a pier at the lake end of their easement (the easement being appurtenant passed with the conveyance of the dominant estate from Sainer to the Klotzes). The Horns sought a permanent injunction to prevent the Klotzes

43. *Id.*

44. 216 N.E.2d 854 (Ind. Ct. App. 1966).

45. *McConnell v. Satterfield*, 576 N.E.2d 1300, 1302 (Ind. Ct. App. 1991).

46. *Hunt*, 216 N.E.2d at 856-57.

47. 558 N.E.2d 1096 (Ind. 1990).

from placing a pier or other structure on the easement. The trial court granted the Horns' motion for summary judgment finding that, as a matter of law, the Klotzes had no right to place a pier at the end of the easement. The court of appeals affirmed, holding that no riparian rights were expressly granted to Sainer under the warranty deed. The Indiana Supreme Court granted transfer and reversed.⁴⁸

The supreme court began with the observation that the issue is not whether the Klotzes themselves have riparian rights, but whether they are entitled to use the riparian rights of the Horns, i.e., whether the language "access to the lake" gave them the right to place a pier on the Horns' servient estate. Although the right to maintain a pier was not expressly granted in the deed, if the language of the grant is ambiguous, then parol or extrinsic evidence is admissible to determine the intent of the parties who created the easement "taking into consideration all of the surrounding circumstances."⁴⁹ Here, the evidence revealed that the bottom of the lake was "very murky and weedy" at the end of the easement, making swimming, wading, fishing, and boating extremely limited without a pier to reach deeper water.⁵⁰

The court distinguished *Brown v. Heidersbach*,⁵¹ upon which both the trial court and court of appeals relied, in finding that there was no right to maintain a pier on the easement. The supreme court noted that in *Brown*, the easement was granted for the benefit of a number of lot owners to be used in common. Additionally, unlike the present case, there was a beach available to the lot owners in *Brown* which made it possible for them to enjoy their easement without a dock or pier. More importantly, in *Brown*, the court considered the surrounding circumstances in reaching its conclusion that no riparian rights were intended to be granted: "An instrument creating an easement must be construed according to the intention of the parties, as ascertained from all facts and circumstances, and from examination of all its material parts."⁵² The court admonished the trial court that on remand it "should likewise hear evidence to determine the intent of the parties who created the easement and then balance the interests of the present titleholders of the dominant and servient estates."⁵³

In a dissenting opinion, Justice DeBruler concluded that the granting of a six foot wide path for access to the lake did not indicate that the

48. *Id.* at 1100.

49. *Id.* at 1098.

50. *Id.* at 1099.

51. 360 N.E.2d 614 (1972).

52. *Id.* at 620.

53. *Klotz v. Horn*, 558 N.E.2d 1096, 1100 (Ind. 1990).

parties intended its use for cars or the transportation of large watercraft.⁵⁴ Furthermore, the attachment of a pier at the end of the easement would require a construction on and alteration of the bank which would severely restrict the right of the landowners to enter and leave the lake or to tie up boats of their own. Justice DeBruler would affirm the summary judgment based on the physical evidence surrounding the granting of the easement.⁵⁵

*Hunter v. Kellogg*⁵⁶ presented a somewhat similar factual situation. The Scheeles conveyed property abutting Lake Wawasee, but reserved a five foot strip "for ingress and egress to and from the roadway to the water's edge of the Lake."⁵⁷ Nothing was said about the right to construct a pier at the end of the easement, but the grantors constructed a pier immediately following the conveyance, and it remained in seasonal use for approximately fifty years until this suit was brought. The trial court found that although the deed did not expressly reserve riparian rights, the dominant tenants (the Scheeles) intended to reserve the right to place a pier in the lake.

Hunter, the current owner of the servient estate, argued that the language in the deed was unambiguous and that it was error for the trial court to have considered surrounding facts and circumstances to determine the grantors' intent. The court of appeals, citing *Klotz*, agreed with the trial court that the language in the instrument was ambiguous.⁵⁸ Furthermore, the court found that because the easement was created by reservation, rather than by grant, there was even more of an ambiguity.⁵⁹ The trial court judgment was affirmed.⁶⁰

In *Bromelmeier v. Brookhart*,⁶¹ the question of riparian rights was raised in the context of an easement acquired by prescription. Since about 1962, the Bromelmeiers and their predecessors in title had used a ten foot wide strip located between the lots of Brookhart and Stellhorn for access to Crooked Lake. In 1987, Brookhart and Stellhorn purchased the ten foot strip and commenced this action. The trial court found that the Bromelmeiers had acquired a prescriptive easement, but that it did not include the right to maintain a pier. The court reached this conclusion based on two factors: (1) the easement did not give the dominant tenant riparian rights and (2) during two summers the Bro-

54. *Id.* (DeBruler, J., dissenting).

55. *Id.*

56. 563 N.E.2d 1338 (Ind. Ct. App. 1990).

57. *Id.* at 1339.

58. *Id.* at 1340.

59. *Id.*

60. *Id.* at 1340-41.

61. 570 N.E.2d 90 (Ind. Ct. App. 1991).

melmeiers had elected not to place a pier in the lake, thus interrupting the prescriptive period.⁶²

As to the first point, the court of appeals noted that in *Klotz*, the Indiana Supreme Court had determined that an access easement may include the right to maintain a pier.⁶³ Although *Klotz* involved an express easement, the court determined that the purpose and intent of the parties has no less of a bearing on the scope of an easement by prescription. Here the facts indicated that Robert Seely, a predecessor in the Bromelmeiers' title, had used the strip in 1962 for swimming, walking, and boating and had placed a pier in the lake at the end of the easement. In addition, he stored the pier sections on the strip of land during the winter. The pier was used continuously except for a two year period in 1971 and 1972.

The trial court found that the Bromelmeiers had failed to establish a continuous twenty year use of the easement for storing and attaching a pier. However, the court of appeals did not agree. In 1971, the pier was in disrepair and the then owners of the Brookhart property (the Conrads) testified that they allowed the Bromelmeiers to use their pier until they could get a new one. The Bromelmeiers purchased a new pier in 1973 and the use resumed uninterrupted until 1988. The court concluded that "mere intermissions in use of reasonable durations" will not prevent the establishment of a prescriptive easement.⁶⁴ To stop the adverse period from running, there must be an interruption of the use by the owner of the servient estate or a voluntary abandonment of the easement by the adverse user. Here, there was no evidence of an intent to abandon the easement.

In light of these facts, the court of appeals held it was "clearly erroneous" for the trial court to fragment the use and purpose of the easement by recognizing a right of access to the lake but denying a right to maintain the pier.⁶⁵ The part of the judgment denying the Bromelmeiers the right to maintain the pier was reversed.⁶⁶

III. LANDLORD AND TENANT

A. *Clauses Limiting Right of Tenant to Assign or Sublet*

The tenant's interest in a lease is freely alienable unless the lease contains a covenant against the transfer of the tenant's interests.⁶⁷ Rather

62. *Id.* at 91.

63. *Id.*

64. *Id.* at 92 (relying on *Griffith v. Neff*, 196 N.E.2d 757 (Ind. Ct. App. 1964)).

65. *Id.*

66. *Id.* at 92-93.

67. Because such clauses restrict the free alienation of property, they are not

than prohibiting such transfers, clauses more commonly require the tenant to obtain the landlord's consent to an assignment or sublease.⁶⁸ Under the traditional common-law rule, the landlord can arbitrarily and capriciously refuse to consent to an assignment or subletting for any reason unless the language of the covenant provides that such consent shall not be unreasonably withheld.⁶⁹ Recently, however, a number of jurisdictions have abandoned the common-law rule and have adopted a commercially reasonable standard requiring the landlord to show reasonable grounds for the refusal to consent to the transfer unless the language of the covenant provides that such consent may be arbitrarily withheld.⁷⁰

During the last survey period, the Indiana Court of Appeals, in *First Federal Savings Bank v. Key Markets, Inc.*,⁷¹ rejected the traditional common-law rule and adopted a construction of the covenant based upon the contractual duties of the parties to act reasonably and in good faith. In so doing the court used the rationale set forth in *Fernandez v. Vasquez*:⁷²

[A] lease is a contract and, as such, should be governed by the general contract principles of good faith and commercial reasonableness. One established contract principle is that a party's good faith cooperation is an implied condition precedent to performance of a contract. Where that cooperation is unreasonably withheld, the recalcitrant party is estopped from availing herself of her own wrongdoing. A withholding of consent to assign a lease which fails the tests for good faith and commercial reasonableness, constitutes a breach of the lease agreement.⁷³

The Indiana Supreme Court granted transfer and reversed.⁷⁴

In reversing the court of appeals decision, the supreme court refused to accept the contractual construction of the covenant adopted by the court of appeals:

avored by the law and are narrowly construed. See CUNNINGHAM, *supra* note 32, § 6.69, at 386. Thus, a clause prohibiting the "assignment" of the lease without the consent of the landlord would not prohibit the tenant from subletting the premises, nor would a provision prohibiting "subletting" without the landlord's consent prohibit an assignment. See *F.W. Woolworth Co. v. Plaza North, Inc.*, 493 N.E.2d 1304 (Ind. Ct. App. 1986).

68. CUNNINGHAM, *supra* note 32, § 6.69, at 386.

69. *Id.* at 387-88.

70. CRIBBET & JOHNSON, *supra* note 33, at 275.

71. 532 N.E.2d 18 (Ind. Ct. App. 1988).

72. 397 So. 2d 1171 (Fla. Dist. Ct. App. 1981).

73. *Id.* at 1173-74.

74. *First Fed. Sav. Bank v. Key Markets, Inc.*, 559 N.E.2d 600 (Ind. 1990).

These broad general statements of contract construction do not accurately describe the duties and responsibilities of courts in interpreting contracts, or they should at least be applied in very limited and specific instances where such a question of construction is apparent, particularly when one uses such expressions as "good faith cooperation," "recalcitrant party" and "wrong-doing."⁷⁵

Instead, the court held that when the wording of the consent to assign provision does not specifically provide that the landlord's consent "shall not be unreasonably withheld," such language should not be implied, and the contract shall be enforced as written. The parties to a contract are free to agree to limit the assignability of a lease, and when they so choose, the court should look to the language used by the parties to express their intent. If the parties desired to limit the landlord's right to withhold consent they could have done so by including the phrase "which consent shall not be unreasonably withheld." When the language used by the parties is clear and unambiguous, the court will require the parties to perform consistently with the bargain they made.⁷⁶ The court concluded with the following observation:

It is not the province of the courts to require a party acting pursuant to such a contract to be "reasonable," "fair," or show "good faith" cooperation. The proper posture for the court is to find and enforce the contract as it is written and leave the parties where it finds them. It is only where the intentions of the parties cannot be readily ascertained because of ambiguities or inconsistency in the terms of the contract or in relation to extrinsic evidence that a court may have to presume the parties were acting reasonably and in good faith in entering into the contract.⁷⁷

Neither of the parties required "paternalistic protection" because they were experienced in business enterprises and "entered into a lease clear in its terms and well understood in the business community."⁷⁸

B. Rent Acceleration Clause

A rent acceleration clause allows the landlord to advance the due date on future rent installments in the event of the tenant's breach of

75. *Id.* at 603.

76. *Id.* at 603-04.

77. *Id.* at 604.

78. *Id.* at 606.

any of the covenants in the lease.⁷⁹ Many courts see no problem with such a provision because the landlord could have made the entire rent payable in advance in the lease. The landlord is simply making the rent payable in advance upon the happening of a condition, the tenant's default.⁸⁰ A problem arises, however, when the landlord chooses to evict the tenant because of the default and also attempts to recover the entire rent for the remainder of the term under the acceleration clause. When the lease is terminated, the court may view the tenant's duty to pay rent as ending and the provision for acceleration of the rent as a liquidated damages provision or an unenforceable penalty.⁸¹

In Indiana the problem is further confused by a recent decision, *Nylen v. Park Doral Apartments*,⁸² which holds that rent may be recovered for the remainder of the term, even after an eviction of the tenant, when a "saving clause" so provides.⁸³ Finally, under traditional landlord-tenant law, when the tenant voluntarily vacates the premises before the end of the term, the tenant's duty to pay rent continues, and a rent acceleration clause, if enforceable, would simply make future rent payable immediately. Today, however, in a growing number of states, including Indiana,⁸⁴ when the tenant abandons the premises before the end of the term, the landlord is under a duty to mitigate his damages by making reasonable efforts to relet the premises.⁸⁵ Thus, the landlord will not be entitled to the full rent for the remainder of the term under an acceleration clause.

The validity of an acceleration clause was raised in *Parrish v. Toth*.⁸⁶ Less than one year after leasing commercial property for a term of three years, the tenant (Parrish) vacated the premises and ceased paying rent. The landlord (Toth) filed suit seeking the rent for the remainder of the term, clean-up costs, and attorney's fees. The court found that the lease had been breached and issued a partial summary judgment in favor of Toth. A hearing was held on the issue of damages, and Parrish raised Toth's failure to mitigate damages. The court found that Toth had made

79. ROBERT S. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD AND TENANT* § 5.40, at 351 (1980).

80. *Id.* See also CUNNINGHAM, *supra* note 32, § 6.52, at 365.

81. CUNNINGHAM, *supra* note 32, § 6.52, at 366. See also SCHOSHINSKI, *supra* note 79, § 5.40, at 351-53.

82. 535 N.E.2d 178 (Ind. Ct. App. 1989).

83. *Id.* at 182-83. The saving clause in *Nylen* provided the following: "Eviction of tenant for a breach of lease agreement shall not release tenant from liability for rent payment for the balance of the term of the lease." *Id.* at 181.

84. See, e.g., *State v. Boyle*, 344 N.E.2d 302 (Ind. Ct. App. 1976); *Hirsch v. Merchants Nat'l Bank & Trust Co.*, 366 N.E.2d 833 (Ind. Ct. App. 1975).

85. SCHOSHINSKI, *supra* note 79, § 10.12, at 675-81.

86. 559 N.E.2d 369 (Ind. Ct. App. 1990).

reasonable efforts to relet the premises, and a judgment was entered awarding Toth twenty-nine months rent, clean-up costs, and attorney's fees, less set-off for common area maintenance charges.⁸⁷

The court distinguished *Roberts v. Watson*,⁸⁸ which held that rent installments not yet due and owing cannot be recovered by the landlord upon the tenant's default. Here, the court reasoned, the rent for the entire balance of the term had become due upon the tenant's default under the acceleration clause.⁸⁹

It should be noted that the court awarded the landlord the full amount of the future rent installments, even though there were more than twenty months of the lease term remaining. What would happen if the landlord leased the premises at the same or a higher rent the next month? Could the landlord receive double rent for the remaining nineteen months? It has been suggested that the defaulting tenant, if he has been found liable for the rent for the remainder of the term under an acceleration clause, should be able to recover any additional rent received by the landlord, less expenses and damages.⁹⁰

C. Self-help Eviction

At early common law the landlord could use as much force as necessary to evict a holdover tenant, but today it is generally held that the landlord may only regain possession without judicial process by peaceable means.⁹¹ The key issue becomes what is a "peaceable means." One effective method used by some landlords to force the holdover tenant to vacate the premises is to cut off the utilities. Unfortunately, disconnecting utilities, particularly in the winter months, can lead to serious health problems.⁹² Because of the danger to the health and general welfare of the tenant, a number of modern landlord-tenant statutes now prohibit the landlord from disconnecting utilities in occupied dwellings.⁹³ The constitutionality of two City of Evansville ordinances prohibiting landlords from disconnecting utilities in rental units was raised in *Chandley Enterprises v. Evansville*.⁹⁴ When the tenant failed to pay the rent,

87. *Id.* at 370.

88. 359 N.E.2d 615 (Ind. Ct. App. 1977).

89. *Parrish*, 559 N.E.2d at 372.

90. SCHOSHINSKI, *supra* note 79, § 5.40, at 352.

91. *Id.* § 6.5, at 399-403. See also *Calef v. Jesswein*, 176 N.E. 632 (Ind. Ct. App. 1931).

92. See, e.g., *Welborn v. Society for Propagation of Faith*, 411 N.E.2d 1267 (Ind. Ct. App. 1980).

93. See, e.g., UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 4.207, 7B U.L.A. 427 (1985).

94. 563 N.E.2d 672 (Ind. Ct. App. 1990).

the landlord (Chandley) disconnected the utilities. The tenant complained to the Evansville Department of Code Enforcement, which ordered the landlord to reconnect the utilities. Chandley complied with the order, but subsequently brought an action for a declaratory judgment to have the two ordinances declared illegal.

Chandley first argued that the ordinances violated the constitutional prohibition against impairment of contractual obligations. The lease contained the following provision:

B. Lessor further reserves the right to use whatever self-help it deems appropriate and necessary to effectuate re-entry and taking of possession of premises including, but not limited to, disconnection of all gas, electric, water and other utility services as well as changing of locks and removal of personal property located upon said premises.⁹⁵

In rejecting this argument, the court observed that the city ordinance was adopted in 1962, that the lease was entered into in 1988, and that the constitutional prohibition against impairment of contracts does not apply to contracts entered into after a statute is already in force.⁹⁶

Chandley also argued that the ordinances interfered with his right to contract now and in the future. Chandley argued that to justify the impairment of contracts, an ordinance must be necessary and reasonable under the circumstances.⁹⁷ The court agreed, but concluded that the ordinances in question were a reasonable exercise of the city's police power: "These ordinances may be intended to preserve the health and safety of dwellers, to prevent landlords from constructively evicting tenants, and to preserve the status quo pending a judicial determination of the parties' rights."⁹⁸ The court also rejected Chandley's argument that the ordinances force landlords to pay a trespasser's utilities, finding that "a landlord has other options for removal of a trespasser including the pursuit of court action."⁹⁹

Chandley also claimed that, as a penalty statute, the ordinances "must be sufficiently explicit so as to inform individuals of the consequences of the contemplated conduct."¹⁰⁰ The court, however, did not find the language vague because it simply prohibited the landlord from

95. *Id.* at 674.

96. *Id.*

97. *Id.* at 674-75 (relying on *Wencke v. City of Indpls.*, 429 N.E.2d 295 (Ind. Ct. App. 1981)).

98. *Id.* at 675.

99. *Id.*

100. *Id.*

disconnecting utilities in an occupied dwelling.¹⁰¹ Likewise, the court rejected Chandley's argument that the statute was overbroad and interfered with the legitimate rights of lessors to remove trespassers from their property. The court held that landlords do not have an absolute right to use self-help.¹⁰²

Finally, Chandley argued that a municipality may not alter the law governing civil actions between private individuals. The court agreed that the police powers of a municipality are restricted to the protection or promotion of a public interest or welfare, but that when the ordinances, as here, are found to be for the health and safety of tenants, they will not be declared invalid merely because they affect private relationships.¹⁰³

The right of the landlord to resort to self-help was also discussed in *Adami-Saenger Partnership I v. Wood*.¹⁰⁴ Wood, a tenant in a shopping center mall, leased space from Adami-Saenger Partnership I. Lee, the mall manager, "took exception to Wood's behavior while a tenant of the Mall"¹⁰⁵ and refused to renew Wood's lease when it terminated on July 31, 1988. However, the landlord's attorney, Bieberstein, verbally offered Wood a three year lease of a vacant space in the mall on July 18, 1988. Wood accepted the offer and waited for a copy of the lease. Subsequently, Bieberstein notified Wood that he had withdrawn his offer and reminded her that the lease was to end on July 31. Wood refused to vacate. Lee, after consulting with the mall's attorney, decided she did not want to wait another sixty to ninety days to remove the tenant by judicial process and resorted to self-help on August 1, 1988. After the mall closed, the tenant's property was removed from a kiosk space and placed in another space (Marsh space) in the mall also being used by the tenant. The lock on the Marsh space was changed, thus preventing the tenant access to her property for one day. In addition, during removal of the property from the kiosk space, some merchandise was damaged. The court permitted the tenant to recover compensatory damages, including lost profits,¹⁰⁶ but denied punitive damages:

To recover punitive damages for breach of contract, a plaintiff is required to prove by clear and convincing evidence, that the

101. *Id.*

102. *Id.*

103. *Id.* at 675-76.

104. 568 N.E.2d 1112 (Ind. Ct. App. 1991).

105. *Id.* at 1113.

106. *Id.* at 1113-15. Judge Conover, in a dissenting opinion, argued against awarding lost profits, pointing out that Wood was no longer a mall tenant since her lease had expired. It would appear, however, that the majority viewed the verbal offer of a three year lease by Adami's attorney and Wood's acceptance as a new lease justifying the awarding of future profits.

defendant's actions in breaching the contract were accompanied by malice, fraud, gross negligence or oppressive conduct. . . . Moreover, the plaintiff must produce some evidence "that is inconsistent with the hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, overzealousness, mere negligence or other such noniniquitous human failing."¹⁰⁷

Here, the court found that while Lee's decision to use self-help was "improvident," "the evidence was not inconsistent with the hypothesis that Adami's conduct was the result of mere overzealousness."¹⁰⁸

D. Landlord's Liability for Criminal Acts of Third Parties

Traditionally, the landlord has not been held liable for injury to the tenant caused by the criminal acts of a third party. However, in the past few years there has been some chipping away at the landlord's immunity.¹⁰⁹

In *Nalls v. Blank*,¹¹⁰ the tenant was assaulted when she entered her third floor apartment by an individual who had gained access to the apartment building and the third floor by vandalizing a key retaining box affixed to the outside of the building. In the tenant's suit against the landlord for negligence, the trial court entered summary judgment in favor of the landlord and the tenant appealed.

The landlord made an interesting argument by claiming that the utilization of a key retaining box could not be considered negligence because it is one of three alternative methods of access to apartment house mail boxes required by U.S. postal regulations to be provided by owners of apartment houses with self-closing, automatic locking street doors.¹¹¹ The court responded by noting that compliance with an administrative regulation does not establish as a matter of law that due care was exercised.¹¹² The regulation was adopted to provide the mail carrier with access to the mail boxes and had nothing to do with the safety of the tenant. Furthermore, the regulation did not require that the receptacle provide access to any part of the building other than where the mail boxes were located. It may not have been reasonable

107. *Id.* at 1115.

108. *Id.*

109. See SCHOSHINSKI, *supra* note 79, § 4.15, at 217-23. See also *Center Management Corp. v. Bowman*, 526 N.E.2d 228 (Ind. Ct. App. 1988).

110. 571 N.E.2d 1321 (Ind. Ct. App. 1991).

111. *Id.*

112. *Id.* at 1323.

for the landlord to leave a key in the receptacle which provided access to other parts of the building.

Although it is the traditional common-law rule that the landlord is under no duty to protect the tenant from criminal acts, the court noted the following exception:

[A] duty may be imposed upon one who, by affirmative conduct or agreement, assumes to act, even gratuitously, for another. . . .

In this case, defendant provided self-closing, self-locking steel doors both at the street level entrance to the apartment building and at the entrance to the third floor where plaintiff's apartment was located. The trier of fact could reasonably infer that defendant had undertaken to provide security to plaintiff against criminal attack by a third party.¹¹³

Since the jury could reasonably find that it was not necessary to provide the mail carrier with access to the upper floors of the apartment building or to leave a key in the receptacle which would allow access to all floors, the granting of summary judgment was deemed inappropriate, and the case was reversed and remanded.¹¹⁴

IV. MINERAL ESTATES — STRIP MINING¹¹⁵

With technological advances in the methods of extracting minerals, one of the more controversial issues has become the degree to which the owner of the mineral estate may damage or destroy the surface estate in removing the underlying minerals.¹¹⁶ Often, the deed severing the mineral estate from the surface estate is written in broad language conveying "all minerals" or "all coal" to the grantee and waiving liability for damage to the surface.¹¹⁷ Although such deeds are generally silent regarding the specific right to strip mine, some courts have interpreted the broad language in the grant of the mineral estate as a waiver of

113. *Id.*

114. *Id.* at 1324.

115. The term "strip mining" is used to describe any type of mining in which the surface of the earth is removed to enable extraction of the underlying minerals.

116. See generally Donald N. Zillman & J. Russell Tyler, Jr., *The Common Law of Access and Surface Use in Mining*, 1 J. MIN. L. & POL'Y 267 (1985); Michael V. Withrow, Comment, *Broad-form Deed—Obstacle to Peaceful Co-existence Between Mineral and Surface Owners*, 60 KY. L.J. 742 (1972).

117. The term "broad form deed" is often used to describe such an instrument. Normally such a deed contains a long and detailed description of the rights granted to the owner of the mineral estate and reserves to the grantor only such surface rights as are consistent with the mineral rights conveyed. See *Akers v. Baldwin*, 736 S.W.2d 294, 298 (Ky. 1987).

the common-law right to support of the surface¹¹⁸ and have suggested that the conveyance of "all minerals" (or "all coal") carries with it the right to remove all the minerals (or coal) even if the only economically feasible way to do so results in the destruction of the surface estate.¹¹⁹ Other courts, however, look at the circumstances existing at the time of the conveyance to determine whether the parties intended to permit surface mining. An important factor in determining the intent of the parties is whether, at the time of the conveyance, shaft mining was the only method used for extracting minerals in the area.¹²⁰ Finally, some courts hold that the right to strip mine minerals should be permitted only when the right to do so is clearly expressed in the deed.¹²¹

The nature and extent of the right of the owner of the mineral estate to use the surface estate in extracting the underlying coal was raised in *Consolidation Coal Co. v. Mutchman*.¹²² The action was brought by a lessee to determine the nature and extent of the title and interests of the owners of a number of coal estates purchased in fee simple from Gibson County in 1943. The trial court found that except in instances where the deeds limited the grant to specific seams or veins of coal or where the grant conveyed all but a certain vein or seam, the deeds "were unambiguous and were intended to convey 'all coal' regardless of the methodology which might be employed to remove it or the depth where the coal could be found."¹²³ The court also found that ownership of "all coal" carried with it the right to remove the coal by reasonable and necessary methods, but a factual question existed concerning the extent of the use of the surface reasonably necessary for the removal

118. Zillman & Taylor, *supra* note 116, at 280-82.

119. See, e.g., *Buchanan v. Watson*, 290 S.W.2d 40 (Ky. Ct. App. 1956); *Department of Forest & Parks v. George's Creek Coal & Land Co.*, 242 A.2d 165 (Md.), *cert. denied*, 393 U.S. 935 (1968); *Western Energy Co. v. Genie Land Co.*, 635 P.2d 1297 (Mont. 1981).

120. These courts interpret the deed in light of existing circumstances and conclude that the parties only intended to allow extraction of the minerals under then accepted mining methods. See, e.g., *Smith v. Moore*, 474 P.2d 794 (Colo. 1970); *Christensen v. Chromalloy Am. Corp.*, 656 P.2d 844 (Nev. 1983); *Franklin v. Calliccoat*, 119 N.E.2d 688 (Ohio Com. Pl. 1954); *Stewart v. Chernicky*, 266 A.2d 259 (Pa. 1970); *Doochin v. Rackley*, 610 S.W.2d 715 (Tenn. 1981); *DuBois v. Jacobs*, 551 S.W.2d 147 (Tex. 1977); *Phipps v. Leftwich*, 222 S.E.2d 536 (Va. 1976); *West Virginia-Pittsburgh Coal Co. v. Strong*, 42 S.E.2d 46 (W. Va. 1947). Kentucky attempted to adopt this construction by statute, KY. REV. STAT. § 381.930-947 (Baldwin 1984), but the statute was struck down by the Supreme Court of Kentucky as unconstitutional. *Akers v. Baldwin*, 736 S.W.2d 294 (Ky. 1987).

121. See, e.g., *Franklin v. Calliccoat*, 119 N.E.2d 688 (Ohio Com. P. 1954); *West Va.-Pittsburgh Coal Co. v. Strong*, 42 S.E.2d 46 (W. Va. 1947); *Stewart v. Chernicky*, 266 A.2d 259 (Pa. 1970).

122. 565 N.E.2d 1074 (Ind. Ct. App. 1990).

123. *Id.* at 1081.

of the coal which precluded the granting of partial summary judgment on this issue. The lessee appealed the denial of the partial summary judgment.

On appeal, the surface owners contended that the coal deeds were intended only to convey so much of the coal as was minable at the time of the conveyance, i.e., by shaft mining and not by strip mining.¹²⁴ The court of appeals examined three Indiana decisions dealing with the right of the owners of the mineral estate to use the surface¹²⁵ and reached the following conclusion: "From this trilogy of cases, we deduce that in Indiana the question is not so much whether the deed is ambiguous but whether strip mining, even though not contemplated by the parties, is reasonably necessary to effectuate the grant."¹²⁶ Although the court found that this rationale applied to the majority of deeds involved, it did not apply in those situations "where the grantor expressly set out to preclude use of the surface or required immediate payment of damages for injury to crops."¹²⁷ In such cases, "'all coal' may not have been

124. The surface owners cited decisions from Pennsylvania, West Virginia, and Ohio for the position that strip mining is not an incident to ownership of the mineral estate.

125. *Consolidation Coal*, 565 N.E.2d at 1082-83. In *Ingle v. Bottoms*, 66 N.E. 160, 163 (Ind. 1902), the Indiana Supreme Court held that the surface owner had no right to interfere with the construction of a railroad switch on the surface by the owner of the mineral estate. Ownership of the coal carried with it as a necessary incident, not only the right to penetrate the surface, but also the means and processes for mining and removing the coal as may be reasonably necessary including the construction of roads and railroad tracks.

In *Drake v. Durreger*, 11 N.E.2d 88 (Ind. Ct. App. 1937), the surface owners brought suit to prevent the coal owners from stripping the dirt above the coal, claiming that the coal could be removed by shaft mines and that the surface was best suited for agriculture. The *Drake* court, citing *Ingle*, held that the existence of a right to surface mine was a question of fact, i.e., whether the method used was unreasonable and unnecessary.

In *Creasey v. Pyramid Coal Corp.*, 61 N.E.2d 477 (Ind. Ct. App. 1945), the coal owners constructed an electric transmission line on the surface even though the grant did not expressly include the right to erect a transmission line and even though the use of electricity to operate mining equipment was unknown at the time of the grant. The court found that the grant was so broad that it was clear the grantors intended to give the grantees the right to make whatever use of the surface as was reasonably necessary in removing the coal from beneath the land. It should be noted that both *Ingle* and *Creasey* involve the right to use the surface incident to shaft mining of coal and do not involve the right to strip mine coal. Although *Drake* does involve the removal of a portion of the surface to reach the coal, the court refers to the dig as "a 'drift' shaft into the hillside to reach a rider vein." *Drake*, 11 N.E.2d at 90. Furthermore, in the reservation of the mineral estate in *Drake* the grantor expressly reserved "the right to dig, mine, and remove said coal and minerals . . . without liability for caving in or subsidence of the surface incident to mining and removing the coal." *Id.*

126. *Consolidation Coal*, 565 N.E.2d at 1083.

127. *Id.* There were 116 deeds involved which the court grouped into five sets

intended to include the coal removable only by destroying the surface," and extrinsic evidence may be introduced to aid in construction.¹²⁸ However, with regard to the unambiguous deeds, the trial court should have entered partial summary judgment in favor of the lessee.¹²⁹

This decision appears to recognize that when "all coal" is conveyed by a mineral deed which does not contain language limiting the use of the surface, strip mining is permitted if this method of mining is reasonably necessary to remove the minerals.

V. VENDOR AND PURCHASER

A. Inquiry Notice

If an interest in land is not properly recorded, a subsequent purchaser will take the property free and clear of the unrecorded interest provided he is a bona fide purchaser "in good faith and for a valuable consideration, having his deed, mortgage or lease first recorded."¹³⁰ In order to qualify as a bona fide purchaser, the subsequent grantee must be without actual or constructive notice of the unrecorded interest at the time of the purchase. In Indiana, inquiry notice is a type of actual notice which occurs when the purchaser has information which would lead a reasonable person to make an inquiry. The purchaser will be charged with actual knowledge of all interests or claims which the inquiry would have disclosed.¹³¹ Inquiry notice issues were raised in two cases decided during this survey period.

In *Guthrie v. National Advertising Co.*,¹³² Guthrie purchased land subject to an unrecorded ground lease. At the time of the sale, Guthrie was informed by the auctioneer and the seller that there was an advertising

according to the language of the grant. The court indicated that the deeds varied greatly:

Some simply granted "all coal" underlying the estate, with and without the provision "grantee not liable for damages to the surface," while others contain rights to use the surface within limits, as may be necessary for shafts, "granting all such rights as may be necessary for the best operation of the coal mines," without liability for subsistence of the surface. Some contain options to purchase surface; others require payment for the use of the surface taken. Two sets appear to severely limit surface use [by denying any surface rights or requiring the accommodation of farming or payment of damages for destruction of crops].

Id. at 1082.

128. *Id.* at 1083.

129. *Id.* at 1086.

130. IND. CODE § 32-1-2-16 (1988).

131. *White v. Foster*, 77 Ind. 65 (1881); *Willard v. Bringolf*, 5 N.E.2d 315 (Ind. Ct. App. 1936) (holding that actual notice embraces all degrees and grades of evidence from the most direct and positive proof to the slightest circumstances from which a court or jury would be justified in inferring notice).

132. 556 N.E.2d 337 (Ind. Ct. App. 1990).

sign on the land, although he may not have been aware of the name of the lessee. Later, at the closing, Guthrie was informed by the seller and his attorney that National Advertising owned and maintained the advertising sign on the property. Furthermore, Guthrie had the opportunity to inspect the sign, and if he had done so, he would have seen the National 3M logo displayed on both sides. The trial court found that Guthrie had knowledge of facts which should have led a reasonable person to inquire about the lease. Guthrie appealed the finding that he had actual notice of the lease.

In Indiana, an unrecorded lease for more than three years is not valid against a subsequent purchaser of the land "other than the grantor, his heirs and devisees, *and persons having notice thereof*."¹³³ The court observed that had the lease been recorded, the recording would have been constructive notice of its existence, but when the lease is not recorded, subsequent purchasers will be bound only if it is proven that they had actual notice of its existence.¹³⁴ Thus the court turned to the doctrine of inquiry notice: "A purchaser who has notice of facts making it incumbent upon him to make inquiry is bound by all the knowledge that a reasonable inquiry would have imparted and *actual notice may be implied therefrom*."¹³⁵ The court of appeals concluded that the trial court's determination that Guthrie had actual notice of facts sufficient to put a reasonable person on inquiry was supported by the facts and affirmed the judgment.¹³⁶

In *Lamb v. Lamb*,¹³⁷ Vera Lamb conveyed a one-ninth undivided interest in a twenty acre tract of land to her eight children and a daughter-in-law, retaining a life interest in the property. Subsequently, eight of the grantees conveyed their interests to Johnny Lamb as trustee. Johnny was to either reconvey or sell the property and distribute the proceeds to the grantees upon Vera's death. At Vera's death, her son, Francis Lamb, and the Lovealls both expressed an interest in purchasing the entire twenty acre tract. Johnny entered into a contract to sell Francis an undivided eight-ninths interest. Soon thereafter, with Francis's consent, Johnny conveyed two and one-half acres to the Lovealls. The Lovealls were not told of the contract for sale between Johnny and Francis.

When Francis approached Johnny about completing the contract, Johnny, who was ill and operating under the belief that he needed the consent of the other grantees to convey the land, advised Francis to

133. IND. CODE § 32-1-2-11 (1988) (emphasis added).

134. *Guthrie*, 565 N.E.2d at 338.

135. *Id.* (emphasis added).

136. *Id.* at 339.

137. 569 N.E.2d 992 (Ind. Ct. App. 1991).

meet with the other family members and pay each their share. Francis contacted the other family members and all but two accepted payment. Johnny then gave Francis a warranty deed for the eleven and one-half acres he had purchased. In the meantime, the Lovealls obtained the consent of the other two grantees to purchase their interests, and Johnny gave the Lovealls a warranty deed to six acres. Francis, having learned of the sale to the Lovealls, brought this action for specific performance of the contract. The case turned on whether the Lovealls had notice of the contract of sale with Francis at the time they purchased the additional six acres. Francis argued that even though the Lovealls did not have express notice of the contract between Francis and Johnny, the Lovealls had implied notice:

[A]ctual notice has been divided into two classes, (1) express and (2) implied, which is inferred from the fact that the person charged had means of knowledge which he did not use. Whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. This in effect, means that notice of facts which would lead an ordinarily prudent man to make an examination, which, if made, would disclose the existence of other facts is sufficient notice of such other facts.¹³⁸

Francis claimed that the Lovealls were put on notice when they saw him cutting brush on the six acres which they subsequently purchased and when they subsequently discovered that Francis had purchased the remaining eleven and one-half acres. The court disagreed. At the time the Lovealls observed Francis cutting the brush, he owned an undivided interest in the property. This action was not so unusual as to require the Lovealls to inquire further. Likewise, the court held that the Lovealls did not have implied notice when they became aware that Francis had approached other family members and that he had acquired eleven and one-half acres from them.¹³⁹ Instead, in the court's view, such actions were an indication that no contract existed between Francis and Johnny. Thus, the Lovealls were bona fide purchasers with no notice of Francis's interest.¹⁴⁰

B. Equitable Conversion

Once the parties have entered into a valid contract for the sale of real property, equity treats the purchaser as the owner of the real estate.

138. *Id.* at 994 (citing *Mishawaka St. Joseph Loan & Trust Co. v. Neu*, 196 N.E. 85, 89-90 (Ind. 1935)).

139. *Id.*

140. *Id.* at 994-95.

The seller is viewed as holding "bare" legal title as security for the payment of the purchase price. In many states, including Indiana, a judgment creditor can obtain a lien on the judgment debtor's real property by entering and indexing the judgment in the judgment docket in the county where the land is located.¹⁴¹ If the judgment debtor has already sold the real property under a land contract, a question arises as to whether under the doctrine of equitable conversion there is any interest in the real estate for the lien to attach. Clearly the judgment creditor can obtain a garnishment order requiring the purchaser to pay the unpaid purchase price to the judgment creditor, but once the purchaser has paid the full purchase price to the seller without the judgment creditor asserting his rights, does the purchaser take the land free and clear of the judgment lien?

The right of the judgment creditor of a contract vendor to a lien on the real property after the full purchase price has been paid by the purchaser was raised in *Cook v. City of Indianapolis*.¹⁴² Clyde Realty sold real estate to Cosby under a land contract. On June 9, 1977, Blakley obtained a judgment in the amount of \$4,063.75 against Clyde Realty which was recorded in the judgment docket. At the time the judgment was recorded and indexed, Cosby still owed \$5,190.53. Cosby made his final payment to Clyde in July 1977. By a series of conveyances, Cook became the owner of the real estate. In a condemnation action by the City of Indianapolis to acquire title to Cook's property, Blakley intervened and was awarded \$10,783.68 of the condemnation proceeds to satisfy his judgment. Blakley had renewed the judgment against Clyde in 1987, naming Cook as garnishee-defendant. One of the issues raised on appeal was whether the trial court erred in awarding part of the proceeds to Blakley.

In reversing the trial court on this issue, the court of appeals held that under a land contract, title vests in the purchaser at the time the contract is consummated.¹⁴³ The majority cited *Rural Acceptance Corp. v. Pierce*¹⁴⁴ for the position that the vendee's equitable interest is superior to the judgment lien, and the judgment creditor could not reach the property "other than by asserting the vendor's remaining rights." In *Rural*, the court ordered the vendee to pay the balance of the contract to the judgment creditor, but in this case the creditor never asserted its rights to the balance due under the contract; therefore, Cosby took the property free of the lien upon payment of the balance of the contract

141. See, e.g., IND. CODE § 34-1-45-2 (1988).

142. 559 N.E.2d 1201 (Ind. Ct. App. 1990).

143. *Id.* at 1203.

144. 298 N.E.2d 499 (Ind. Ct. App. 1973).

to Clyde.¹⁴⁵ Blakley argued that he was not aware of the land contract and thus had no opportunity to assert his rights, but the court held that the purchaser's possession under the contract was notice to the world of his claim of ownership.¹⁴⁶

In a dissenting opinion, Judge Sullivan interpreted *Rural* differently: "I read [*Rural*] to hold that liens against real estate are valid against a contract purchaser to the extent of the unpaid contract balance at the time the lien attaches."¹⁴⁷ Thus, Judge Sullivan would have awarded Blakley the amount of the unpaid purchase price at the time of the recording of the judgment lien. It should be noted that in *Rural*, the judgment creditor brought a garnishment proceeding to obtain the unpaid purchase price. The case does not indicate that a lien attached to the unpaid proceeds. If the court were to attach a lien on the property in the amount of the unpaid proceeds, the purchaser would be required to search the public records each time he made a payment on the contract to the seller or else run the risk of being forced to pay twice. Since the purchaser acquired his interest before the judgment lien, it can be argued that the subsequent recording of the judgment lien is not notice to the prior purchaser.¹⁴⁸ Furthermore, it can be argued that under the doctrine of equitable conversion there is no longer a real property interest in the debtor/vendor for the judgment lien to attach.¹⁴⁹

C. Boundary Overlap in Deeds: Liability of Title Insurer

In *Downing v. Eubanks*,¹⁵⁰ Mary Spickler conveyed a five acre tract of land (Tract I) to Lentz who reconveyed it back to Mary the same day. Mary then conveyed Tract I in July 1984 to Jerry and Anna Spickler who reconveyed the land to Mary in October 1984. In September 1985, the guardian of Mary's estate conveyed Tract I to the Downings who recorded the deed. The Downings purchased title insurance from the Ticor Title Insurance Company of California.

In August 1977, Mary conveyed a fifteen acre tract (Tract II) abutting Tract I. Subsequently, a 7.02 acre portion of Tract II was purchased by the Russells from the Eubanks under a land contract. A survey by the Russells revealed that their property overlapped Tract I in a strip 100 feet wide and 617.5 feet long. The Russells and the Eubanks then

145. *Id.* at 502.

146. *Id.* at 503.

147. *Cook v. City of Indpls.*, 559 N.E.2d 1201, 1205 (Ind. Ct. App. 1990) (Sullivan, J., dissenting).

148. See CUNNINGHAM, *supra* note 32, § 11.10, at 795.

149. See R. Bruce Townsend, *Secured Transactions and Creditors' Rights*, 8 IND. L. REV. 234, 260-61 (1974).

150. 557 N.E.2d 1027 (Ind. Ct. App. 1990).

brought this action to quiet title to the disputed strip, and the Downings filed a third party complaint against their title insurer. The trial court granted summary judgment to Ticor and following a trial, entered judgment in favor of the Eubanks and the Russells.

On appeal, the Downings argued that they were bona fide purchasers of Tract I because the conveyance of Tract II was outside their chain of title, citing *Szakaly v. Smith*.¹⁵¹ The court found the Downings' reliance on *Szakaly* to be misplaced. *Szakaly* does hold that a grantee cannot be charged with constructive notice of conveyances outside the chain of title;¹⁵² however, because of the reconveyance of Tract I to Mary in 1971, Mary was the owner of both Tract I and Tract II at the time she conveyed Tract II in 1977. Because Mary owned the entire undivided 53.33 acre parcel "when Downing purchased Tract I, the history of Tract I's reincorporation into the parent tract was a matter of record. While remote grantees are not required to search all conveyances from a common grantor, they are required to search those which fall within their chain of title."¹⁵³

With regard to the action against the title insurer, the court noted that the standard preprinted industry-wide form of the American Land Title Association contains a specific exclusion for overlapping boundaries: "(2) Encroachments, overlaps, boundary line disputes, and any other matters which would be disclosed by an accurate survey and inspection of the premises."¹⁵⁴ Because no survey was conducted the overlap was not covered.¹⁵⁵

VI. WATER LAW

A. *Surface Water: The Common Enemy Rule*

At common law surface water was viewed as a common enemy and each landowner was free to "deal with it in such manner as best suits his own convenience."¹⁵⁶ The landowner's right to occupy and improve his property was not restricted by the fact that the changes might cause surface water to accumulate or stand on a neighbor's land or pass onto

151. 544 N.E.2d 490 (Ind. 1989)

152. *Id.* at 492.

153. *Downing*, 557 N.E.2d at 1029.

154. *Id.* at 1030.

155. *Id.* In dicta the court stated that had a survey been conducted which failed to discover the overlap, then it would have been covered by the policy: "An accurate survey of Tract I would have resulted in the overlap being covered by the policy." *Id.*

156. *Argyelan v. Haviland*, 435 N.E.2d 973, 975 (Ind. 1982).

or over it, and he was not liable for any injury caused by his actions.¹⁵⁷ In 1981, the Third District Court of Appeals in *Rounds v. Hoelscher*¹⁵⁸ rejected the common enemy rule in favor of a "reasonable use" test. Earlier the same year, the Second District Court of Appeals in *Argyelan v. Haviland*,¹⁵⁹ applied the common enemy rule in a surface water case. The Indiana Supreme Court granted transfer to settle the conflict between the two districts and reaffirmed Indiana's adherence to the common enemy rule.¹⁶⁰

During this survey period, the court of appeals was once again invited to reject the common enemy rule, but declined. In *Pickett v. Brown*,¹⁶¹ the Picketts sued the adjoining landowners (the Browns) for damages caused by water and mud flowing from the Browns' property after the Browns constructed a new home on their lot. The trial court granted a judgment at the end of the Picketts' evidence based on the common enemy rule. The Picketts argued that they came within the exception recognized by the supreme court in *Argyelan* that "Indiana doubtlessly would not permit a malicious or wanton employment of one's drainage rights."¹⁶² The court, however, found no evidence to support the Picketts' claim that the Browns maliciously channeled or accumulated the water and then cast it upon the Picketts' land. Finally, the Picketts asked the court to abandon the common enemy rule and adopt the reasonable use rule, but the court declined to advocate again the adoption of the reasonable use rule as it had done previously in *Rounds*: "[O]ur supreme court promptly pinned our ears back and reasserted the common-enemy doctrine as the law in Indiana in *Argyelan*. . . . Therefore, as we have experience in this area, we respectfully decline the Picketts' invitation to reverse supreme court precedent."¹⁶³

B. Riparian Rights

In *Watson v. Thibodeau*,¹⁶⁴ the question was raised as to whether riparian rights can be withheld by the grantor of land which abuts the shore of a lake. When the Indianapolis Water Company, who owned the water and land beneath Morse Reservoir, sold abutting land to Shorewood Corporation, covenants and deed restrictions provided that

157. *Id.* at 977. *Argyelan* did recognize one exception: "[O]ne may not collect or concentrate surface water and cast it, in a body upon his neighbor." *Id.* at 976.

158. 428 N.E.2d 1308 (Ind. Ct. App. 1981).

159. 418 N.E.2d 569 (Ind. Ct. App. 1981), *vacated*, 435 N.E.2d 973 (Ind. 1982).

160. *Argyelan v. Haviland*, 435 N.E.2d 973 (Ind. 1982).

161. 569 N.E.2d 706 (Ind. Ct. App. 1991).

162. *Argyelan*, 435 N.E.2d at 976.

163. *Pickett*, 569 N.E.2d at 709.

164. 559 N.E.2d 1205 (Ind. Ct. App. 1990).

the owners of subdivision lots abutting the reservoir would have no riparian rights.

In a dispute between two neighboring property owners, the Watsons and the Thibodeaus, the court found that the Watsons' sailboat lift cradle, placed within the boundaries of their extended property line, created a nuisance.¹⁶⁵ The Watsons argued that the Indiana Constitution and statutes granted them riparian rights as abutting landowners despite the terms of the purchase. In rejecting this claim, the court concluded that nothing in the Indiana Constitution or statutes prevents a grantor from withholding riparian rights. Title in Shorewood extended only to the shoreline of Morse Reservoir and Watson could acquire no riparian or littoral rights from Shorewood. In concluding that riparian rights could be withheld, the court also indicated that they could not only be retained by the grantor but that they could be transferred to a third party:

[W]hile riparian rights may be transferred by grant and are generally transferred without special mention in the conveyance, they may be specially *reserved to the grantor*. Riparian rights *may be separated from the ownership of the land to which they are appurtenant, either by grant of such rights to another, or by a reservation thereof in the conveyance of the land*, as did Indianapolis Water Company here.¹⁶⁶

This language appears inconsistent with the views expressed by the Indiana Supreme Court in *Klotz v. Horn*.¹⁶⁷ In *Klotz*, the court held that if the parties intended, the dominant tenant of an access easement to a lake could use the riparian rights of the abutting landowner.¹⁶⁸ The issue was not whether riparian rights attached to the dominant estate which did not abut the lake, but whether the dominant tenant could use the riparian rights of the servient estate. In framing the issue in this manner, the court noted that at least one court has held that riparian rights cannot be conveyed to owners of land not abutting the lake or stream "since riparian rights accrue only to land immediately upon a lake and not to any other land."¹⁶⁹ The language in *Watson* suggests that riparian rights may be reserved by the grantor or conveyed to a third person separate from the abutting property, thus potentially creating riparian rights in non-abutting property or even in gross.

165. *Id.* at 1209.

166. *Id.* at 1208 (emphasis added).

167. 558 N.E.2d 1096 (Ind. 1990).

168. *Id.* at 1097-98.

169. *Id.* at 1098 (citing *Schofield v. Dingman*, 247 N.W. 67 (Mich. 1933)).

1991 Developments In Indiana Taxation

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INTRODUCTION

On the surface, 1991 was a relatively quiet year for Indiana tax law. No major legislation was enacted, no common theme emerged, no tax court rules were changed, and with the exception of the *Indiana Department of Revenue v. Felix*¹ intangibles tax case, tax issues drew little attention. This is reflected by the brevity of this year's Article. After analyzing in detail one important change in the Indiana Rules of Appellate Procedure affecting tax cases, this year's Article simply highlights various decisions dealing with diverse subjects.

I. APPELLATE RULE 18

The most significant development in Indiana taxation came with the enactment of Rule 18 of the Indiana Rules of Appellate Procedure.² This Rule addresses the mechanics for appealing from the Indiana Tax Court to the Indiana Supreme Court. Some background is necessary to understand fully the consequences of the Rule.

Prior to the creation of the tax court in 1986, tax cases were heard by the county circuit courts. Appeals from decisions of the circuit courts were taken directly to the Indiana Court of Appeals as for any other case.³ Further review from the Indiana Supreme Court was allowable in the court's discretion under its transfer jurisdiction.

With the creation of the Indiana Tax Court, the legislature put the work of all the circuit courts into one specialized tax forum in order

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1. 571 N.E.2d 287 (Ind. 1991), *cert. denied*, 60 U.S.L.W. 3154 (U.S. Feb. 18, 1992).

2. IND. R. APP. P. 18.

3. See, e.g., IND. CODE § 6-8.1-9-1 (1988).

to promote uniformity in tax adjudication.⁴ The legislature then streamlined the next level of appeal by providing, in Indiana Code section 33-3-5-15, that "decisions of the tax court may be appealed directly to the supreme court."⁵ The legislature thus removed the Indiana Court of Appeals from the tax arena, opting instead to have tax cases appealed to and decided by the state's highest court.

The tax court's enabling statute is silent on how such an appeal is to be taken, however. In a 1987 case, the State Board of Tax Commissioners sought to appeal a decision from the tax court and formally asked the supreme court for guidance.⁶ The court announced the following order:

This Court now orders that appeals of final orders from the Indiana Tax Court shall be filed in the Indiana Supreme Court under the following guidelines: Counsel for appellant shall file a motion to correct errors and praecepe [sic], in the Tax Court, in accordance with T.R. 59 and A.R. 2(A). The Record of Proceedings and briefs shall be filed in the Indiana Supreme Court in accordance with A.R. 3(B) and A.R. 8.1, respectively. Pre-Appeal Statements under A.R. 2(C) shall not be filed. Normal rules for preparation of the Record and briefs shall apply.⁷

Thus, the supreme court would act much as the court of appeals does in routine appeals.

This procedure changed with the adoption of Indiana Rule of Appellate Procedure 18. Some time during 1990, work began on a draft of Rule 18. The authors of this Article are unaware of who initiated the effort to alter this area of tax practice or why the Rule was cast the way it reads. All that is known in the way of "legislative history" is that the Tax Court Liaison Committee of the Indiana State Bar, which is comprised of several leading Indiana tax practitioners and a representative of the Indiana Attorney General's office, was supplied with a draft copy of Rule 18 in late 1990. The Committee sought input from practitioners and prepared an eighteen page report concerning the Rule.⁸ Although the Tax Court Committee Report welcomed the centralization

4. See, e.g., *Indiana Dep't of State Revenue v. Caylor-Nickel Clinic, P.C.*, No. 49S009107-TA-S94, slip op. at 4 (Ind. Mar. 6, 1992).

5. IND. CODE § 33-3-5-15 (1988).

6. *State Bd. of Tax Comm'rs v. Fraternal Order of Eagles Lodge No. 255*, No. 80S05-8703-TA-00349 (Ind. April 21, 1987).

7. *Id.* at 1.

8. REPORT OF THE TAX COURT LIAISON COMMITTEE CONCERNING PROPOSED RULE MODIFYING APPELLATE PROCEDURE IN TAX COURT CASES (Dec. 4, 1990) [hereinafter TAX COURT COMMITTEE REPORT] (copy on file with John R. Maley).

of procedures for appeal to the supreme court into one rule, it noted concern over one aspect of Rule 18 discussed later in this Article.

As with many rule changes from the Indiana Supreme Court, the court announced the enactment of Rule 18 without notice to the bar or the public and without any public hearing. The Rule was enacted on June 4, 1991, and became effective on January 1, 1992. Rule 18 makes significant changes to the rights and procedures for appealing adverse decisions of the Indiana Tax Court.

Rule 18 provides that a petition for rehearing may, but need not, be filed in the tax court prior to seeking further review.⁹ If rehearing is sought, the petition must be filed within twenty days of the adverse final order.¹⁰ The Rule then provides that any party "adversely affected by a final decision of the tax court shall have a right to petition the Supreme Court for review."¹¹

This right, however, is not the same one that existed prior to January 1, 1992. Under prior law, a full appeal was taken to the supreme court; there was no discretion for the supreme court to decline review. With Rule 18, this practice changed. The Rule confirms this by providing that a "petition for review" can be filed with the supreme court within thirty days of the tax court final order.¹² The petition can be based on one or more of six different errors,¹³ which are almost identical to the possible bases for a petition to transfer a case from the Indiana Court of Appeals to the Indiana Supreme Court under Indiana Rule of Appellate Procedure 11(B).¹⁴

Thus, the petition for review, which cannot exceed five pages in length¹⁵ and which may be accompanied by a brief not to exceed ten pages,¹⁶ is much like the transfer petition in that it need not be granted. Indeed, Indiana Rule of Appellate Procedure 18(E)(2) confirms that there is no right of review by providing, "*If the Supreme Court grants the petition for review, the appellant shall have thirty (30) days to file an additional brief not to exceed fifty (50) pages.*"¹⁷ The conditional language of this section clearly indicates that the supreme court has altered Indiana

9. IND. R. APP. P. 18(A).

10. IND. R. APP. P. 18(B).

11. IND. R. APP. P. 18(C).

12. IND. R. APP. P. 18(C),(D).

13. IND. R. APP. P. 18(D)(2)(a)-(f).

14. It should be noted that in the transfer context, the supreme court has held that it has the power to grant transfer on a basis not enumerated in the Indiana Rules of Appellate Procedure. *Baker v. Fischer*, 296 N.E.2d 882, 883 (Ind. 1973). It seems likely that the *Baker* rationale would apply in the related "petition for review" setting as well.

15. IND. R. APP. P. 18(C).

16. IND. R. APP. P. 18(E)(1).

17. IND. R. APP. P. 18(E)(2) (emphasis added).

tax practice by abolishing the automatic right of appellate review.

Although Judge Fisher, the current tax court judge, has done a commendable job discharging the duties of the tax court, and in most instances no appeal is even desired,¹⁸ the supreme court's abolition of full appellate review can be questioned on constitutional, statutory, and philosophical grounds. As a constitutional matter, one could ask whether the federal and state due process protections are infringed by Indiana Rule of Appellate Procedure 18.¹⁹ Moreover, Indiana's constitutional provisions dealing with appellate jurisdiction and the "absolute right to one appeal" also suggest constitutional infirmities.²⁰

Further, from a statutory standpoint, it appears that Rule 18 contravenes the legislature's directive in Indiana Code section 33-3-5-15 that decisions of the tax court "may be appealed directly to the supreme court."²¹ A legitimate argument can be made that this vests taxpayers with a right of full appellate review, not just the chance at discretionary review based on six limited grounds as presented in a five page petition and a ten page brief. Supporters of Rule 18 might counter that this is a matter of procedure, over which the supreme court has primary authority.²² Although it is one thing to define by rule how an appeal is to be taken, it is perhaps another to take away a right of appeal under the guise of procedure.

These constitutional and statutory issues cannot, of course, be resolved by this Article. The authors lack the authority, for one thing,

18. From the time of its inception, the tax court has issued approximately 100 final orders. Less than 25% have been appealed, and the majority of those appealed have been affirmed.

19. See U.S. CONST., amend. V, XIV; IND. CONST., art. 1, § 12 ("All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.") The state constitutional issues are particularly noteworthy in this time of new focus on the Indiana Constitution. See, e.g., IND. R. ADMISSION & DISCIPLINE 17 (making Indiana constitutional law a subject for the Indiana Bar examination); *Brady v. State*, 575 N.E.2d 981, 987 (Ind. 1991) (finding greater protections in Indiana's face-to-face clause than the federal confrontation clause); Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

20. See IND. CONST. art. VII, §§ 4, 6.

21. IND. CODE § 33-3-5-15 (1988).

22. See, e.g., *id.* § 34-5-1-2 ("general assembly reaffirms the inherent power of the Supreme Court of Indiana to adopt, amend, and rescind rules of court . . ." affecting matters of procedure); *id.* § 34-5-2-1 (supreme court has power to adopt rules of practice and procedure, and "all laws in conflict therewith shall be of no further force or effect"); *State v. Lewis*, 429 N.E.2d 1110, 1113 (Ind. 1981) (court rule takes precedence over incompatible legislative rule of procedure), *cert. denied*, 457 U.S. 1118 (1982); *Neeley v. State*, 305 N.E.2d 434, 435 (Ind. 1974) ("[i]n the event of such incompatibility the Rules of Court will prevail").

and for another, analysis of such issues would benefit from advocacy in a litigation setting. Ironically, unless the matter were ever to reach the United States Supreme Court on a federal due process issue, it would be decided by the Indiana Supreme Court, which has apparently already rejected similar concerns of practitioners that were discussed by the Indiana State Bar Association's Tax Court Liaison Committee.²³

Beyond the legalities of Rule 18, its wisdom can also be called into question. Indeed, the Tax Court Liaison Committee reported a preference among practitioners for having the supreme court preserve its role as the ultimate appellate arbiter of Indiana tax disputes.²⁴ The Report also considered what would occur if the tax court, which acts principally like a trial court, made a factual finding that a litigant desired to appeal.²⁵ Under a literal reading of Rule 18, no review of any such claimed error could occur.

Finally, in our system of jurisprudence, the very notion of not having at least one opportunity for appellate review is astounding. Again, Judge Fisher is doing an excellent job, but so are hundreds if not thousands of trial court judges across the land (including United States Tax Court judges) whose decisions are subject to full scrutiny by a *panel* of three or more appellate judges. There is something to be said for the American appellate system. If the Indiana Supreme Court had passed a rule stating that appeals from county circuit courts in contract, tort, or other cases were not as of right, one can imagine the outrage. There certainly does not seem to be any reason for tax to be treated any more lightly. Indeed, given that tax, by definition, involves the use of government power against the individual taxpayer, there probably should be more concern for full judicial review. It is respectfully submitted that this aspect of Rule 18 should be reconsidered and rewritten.

Until such time, if any, that the Rule is altered, tax practitioners are left in somewhat of a quandary. From a practical standpoint, two issues arise. First, should litigation strategy at the tax court be modified, and second, what should be done to obtain supreme court review? The answer to the first question is controlled by the simple fact that the Indiana Tax Court is now the court of last resort for Indiana tax law. No lawyer, not even the Attorney General, can guarantee the client will obtain appellate review. Thus, if nothing else, every reasonable effort to prevail on legal, and not just factual, issues must be made at the tax court.

When an adverse decision is reached (and obviously every case does have a loser, whether it be a private taxpayer or the taxpayers collectively

23. TAX COURT COMMITTEE REPORT, *supra* note 8, at 11-12.

24. *Id.*

25. *Id.* at 13.

as represented by the State), the second issue of how to get full review by the supreme court must be addressed. Five pieces of advice are offered:

1. Prepare both a petition for review and an accompanying ten page brief demonstrating the importance of the case and the error committed.
2. Request oral argument. Rule 18 does not address this issue, so seek oral argument under Indiana Rule of Appellate Procedure 10(A). It might only be through the spoken word that the importance of the client's tax case can be effectively conveyed.
3. Look for possible amicus help. The time period for doing this is short, but an amicus brief proclaiming the importance of the issues might catch the court's attention.
4. Consider raising the constitutional and statutory issues outlined above and urge the court that full review is required notwithstanding Rule 18. Although this is a touchy subject that requires delicate handling, there is little to lose when it appears unlikely that the supreme court will accept review in a particular case.
5. Remind the court that it can consider errors that do not fall directly within the outlined bases for review, (or at least the court has so held in the related "transfer" context).²⁶

Despite the legal and practical infirmities of Rule 18 perceived by the authors of this Article, Rule 18 is probably here to stay for the foreseeable future. Thus, tax practitioners must carefully consider the ramifications of restricted appellate review and work to make the best of it for their clients.

There are other aspects of Rule 18 that deserve mention. No extensions of time are permitted for the petition for review and related brief.²⁷ No petition for rehearing may be filed from denial of a petition for review.²⁸ If review is granted, the appellant's brief and any transcripts of evidence are due in thirty days.²⁹

Although the draft of Rule 18 provided to the Tax Court Liaison Committee contained a provision for interlocutory appeals, the version adopted by the supreme court is silent on the matter. In fact, Rule 18 appears to be limited expressly to final orders. It does state, however, that "[a]ll other rules of appellate procedure shall apply to appeals from the Tax Court except as otherwise specifically provided in this Rule 18."³⁰

26. See *supra* note 14.

27. IND. R. APP. P. 18(H)(1), (4).

28. IND. R. APP. P. 18(H)(1).

29. IND. R. APP. P. 18(E)(2), (F)(2).

30. IND. R. APP. P. 18(H)(2).

Presumably, then, Indiana Rule of Appellate Procedure 4(B) governs appeals of interlocutory orders. Most significant in this context is Rule 4(B)(3), which allows appeal of an interlocutory order as of right from the grant or denial of preliminary injunctions.³¹ As discussed in a previous survey article, the tax court's injunctive relief powers are significant and have been invoked on many occasions.³² It would appear that appeal could be taken from the tax court's ruling on a petition for preliminary injunctive relief. This is how it should be, but it would be odd for the supreme court to entertain appeals from such preliminary orders and yet have full discretion to decline review of a final order on the merits.

Thus, Rule 18 is commendable for its attempt to collate and clarify the procedures for appealing from the Indiana Tax Court. Unfortunately, the Rule abolishes the right of appeal from final orders and leaves questions open concerning the appeal of nonfinal orders. The legislature's creation of the tax court and Judge Fisher's job in getting the court off on the right foot have gone a long way towards improving the administration of justice in Indiana tax disputes. Rule 18 could be viewed as one step forward and two steps backward down this road. Hopefully, the supreme court will seek input from the tax bar on these subjects and work to further improve the administration of justice in this important substantive area.

II. SUBSTANTIVE DECISIONS

As noted previously, few tax cases gained notoriety during 1991. Most dealt with fact specific issues and are thus only briefly summarized in this Article. The few decisions that are of general importance to tax practitioners are analyzed in more detail.

A. Jurisdiction

In *Indianapolis Historic Partners v. State Board of Tax Commissioners*,³³ the tax court was presented with an appeal that, according to the State Board, did not fall within any express statutory authorization or procedures for appeals to the tax court. The court ruled otherwise, though it acknowledged that no specific procedure exists for the taxpayer's appeal from the Board's denial of a petition for correction of error after the denial of an economic revitalization area deduction.³⁴ The court nonetheless found jurisdiction proper, reasoning that in Indiana Code

31. IND. R. APP. P. 4(B)(3).

32. Lawrence A. Jegen, III & John R. Maley, *Survey of Recent Developments in Indiana Taxation Law*, 23 IND. L. REV. 531, 532-33 (1990).

33. 563 N.E.2d 1345 (Ind. Tax Ct. 1990).

34. *Id.* at 1348.

section 33-3-5-2,³⁵ which is the part of the tax court's enabling statute, the legislature "did provide a method by which a taxpayer may appeal a tax assessment which the taxpayer believes to be illegal or incorrect."³⁶ The decision further illustrates that the tax court will assume jurisdiction whenever reasonably possible.

B. Sales and Use Taxes

In *Evansville Concrete Supply Co. v. Indiana Department of State Revenue*,³⁷ the timeliness of the taxpayers' claim for refund of sales and use taxes was at issue. The limitation period for such claims is set forth in Indiana Code section 6-8.1-9-1(a), which provides that a claim for refund must be filed within three years of: "(1) the due date of the return; (2) the date of payment; or (3) in the case of a return filed for the state gross retail or use tax [and five other enumerated taxes] the end of the calendar year which contains the taxable period for which the return is filed."³⁸ The Department argued that subdivision (a)(3) provides the exclusive period for sales and use taxes. The tax court disagreed, reasoning that subdivision (a)(3), which addresses returns that have due dates relating to periods shorter than a calendar year, simply provides tax refund claimants with a third alternative.³⁹ The court noted that this subdivision relieves the Department and taxpayers from the burden of filing numerous refund claims for each time period.⁴⁰

Apparently in reaction to the *Evansville Concrete* decision, the Department issued Tax Policy Directive # 1, addressing the related issue of when the Department can assess such taxes.⁴¹ The Directive notes that the language of Indiana Code section 6-8.1-9-1(a)(3) with respect to claims for refund, is also contained within Indiana Code section 6-8.1-5-2, with respect to the three years allowed for assessment.⁴² The Department takes the position in the Directive that a tax assessment for sales taxes, use taxes, and the other enumerated taxes with less than calendar year periods, can be made within three years of the date the return is filed or the date of the return, whichever is later. This interpretation is consistent with the Department's position in the related context of refunds and with the statutory authority under Indiana Code section 6-8.1-5-2.⁴³

35. IND. CODE § 33-3-5-2 (1988).

36. *Indianapolis Historic Partners*, 563 N.E.2d at 1348.

37. 571 N.E.2d 1350 (Ind. Tax Ct. 1991).

38. IND. CODE. § 6-8.1-9-1(a) (1988).

39. *Evansville Concrete*, 571 N.E.2d at 1353.

40. *Id.* at 1354.

41. TAX POLICY DIRECTIVE # 1 (August 1991) (copy on file with John R. Maley).

42. *Id.*

43. See IND. CODE § 6-8.1-5-2 (1988).

In a substantive matter, the tax court decided in *General Motors v. Indiana Department of State Revenue*,⁴⁴ that GM's purchases of packing materials were exempt from sales and use tax because they were used within an integrated production process, notwithstanding that these component parts could have been sold separately on replacement parts markets.⁴⁵ The case is significant not only for the amount at issue, which exceeded \$450,000, but because it gives a well-reasoned interpretation of the equipment exemption standard of Indiana Code section 6-2.5-5-3(b).⁴⁶

The tax court easily found the packaging materials to be directly used in the production process because they were an essential and integral part of an integrated production process.⁴⁷ The key dispute was whether GM's production of an automobile, which occurred in various stages and in various facilities, was an integrated production process. The court found that it was, reasoning that even though finished component parts could be sold in the parts market, the most marketable product was the production of an automobile.⁴⁸ Further, taxing the packing materials would result in tax pyramiding, "the exact evil the legislature intended the exemption statutes to prevent."⁴⁹

Thus, *General Motors* serves as a guide for other manufacturers with similar production processes. No doubt, there are a number of industries besides the auto industry that have various production processes occurring at different plants in different locations. The *General Motors* decision could aid in structuring those operations to avoid sales and use taxes at each level.

C. Income Taxes

In the income tax area, three decisions were issued by the Indiana Supreme Court, with the decision of the Indiana Tax Court affirmed each time. These are summarized as follows:

In *Hoosier Energy Rural Electric Cooperative, Inc. v. Indiana Department of State Revenue*,⁵⁰ the court affirmed Judge Fisher's ruling, holding that imposition of gross income tax on the interstate sale of federal income tax benefits does not violate the Commerce Clause when the seller and its property had their situs in Indiana.⁵¹

44. 578 N.E.2d 399 (Ind. Tax Ct. 1991).

45. *Id.* at 405.

46. See IND. CODE § 6-2.5-5-3(b) (1988).

47. *General Motors*, 578 N.E.2d at 402.

48. *Id.* at 403.

49. *Id.* at 405.

50. 572 N.E.2d 481 (Ind.), *cert. denied*, 112 S. Ct. 337 (1991).

51. *Id.*

In *Hammond Lead Products v. Indiana Tax Commissioners*,⁵² the court affirmed Judge Fisher's ruling that interest income earned under repurchase agreements was subject to adjusted gross income tax because the plaintiff corporation was not the owner of securities entitled to an exemption.⁵³

In *Department of State Revenue v. Chrome Deposit Co.*,⁵⁴ the supreme court affirmed Judge Fisher's ruling for the taxpayer that the taxpayer was in the business of manufacturing a product consumed by its customers so as to take advantage of tax rates for wholesale sales and exemption for equipment used in manufacturing.⁵⁵ The supreme court simply adopted Judge Fisher's opinion on the merits and incorporated it by reference and then briefly explained its rejection of the Department's argument that the tax court had improperly decided questions of fact at summary judgment.⁵⁶

At the tax court level, the only income tax decision of general interest is *Caylor-Nickel v. Indiana Department of State Revenue*,⁵⁷ wherein the court held that the timely filing of a small business corporation gross income tax return is not a condition precedent to claiming the small business exemption.⁵⁸

D. Responsible Officer Liability

In *Ball v. Indiana Department of Revenue*,⁵⁹ the Indiana Supreme Court affirmed the tax court's ruling holding a corporate officer responsible for unpaid corporate sales and withholding taxes.⁶⁰ Ball was the majority shareholder and chief executive of a corporation that failed to pay sales and withholding taxes. There was never any dispute about his status as a responsible officer for purposes of Indiana tax law. Instead, Ball claimed he was not given proper notice of the deficiencies and was thus denied due process.

The supreme court found no due process violation, however, reasoning that "separate and additional notice to the responsible officer of the corporation is not required where there is timely notice to the

52. 575 N.E.2d 998 (Ind. 1991).

53. *Id.* at 1001.

54. 578 N.E.2d 643 (Ind. 1991).

55. *Id.* at 644.

56. The *Chrome Deposit* decision could well be a barometer of how much (or how little) attention will be given by the supreme court to tax court cases now that Appellate Rule 18 is on the books.

57. 569 N.E.2d 765 (Ind. Tax Ct. 1991).

58. *Id.* at 768-71.

59. 563 N.E.2d 522 (Ind. 1990).

60. *Id.* at 525.

corporation as the [responsible officer] statute is, ipso facto, sufficient notice to the responsible officer that a duty exists to remit the tax fund held in trust."⁶¹ The court added:

Under I.C. 6-2.5-9-3, only those persons who have a duty to remit such assessments can be held personally liable for the failure to remit those taxes that are to be held in trust for the State. Thus, because these persons serving the corporation have direct and immediate control of the internal corporate processes dealing with these entrusted funds, it may be safely assumed that they are aware of the responsible officer statute which is the source of their potential personal liability and that they are aware of and privy to corporate correspondence relating to their corporate duties including notices of assessment sent to the corporation.⁶²

Moreover, the court noted that the Department had tried on several occasions to serve Ball with personal notice by certified mail.⁶³ The decision thus stands as a warning to responsible officers to ensure that the corporation remits such taxes.

E. Interest

In the *General Motors* case discussed previously, the tax court also decided that GM was entitled to receive interest on the interest portion of its overpayment.⁶⁴ This sounds confusing at first, but on further review it is not. GM had paid additional tax and interest on the tax. Prior to trial, the Department determined that a portion of the tax was wrongfully assessed and thus, refunded that tax and the interest GM had paid. The Department did not, however, pay refund interest on the deficiency interest for the amount of time GM held that money (the deficiency interest payment).

The tax court ordered the Department to pay interest on this money, reasoning that there is a common-law right to receive interest as damages on money owed or withheld and that the taxing statutes do not abrogate this right.⁶⁵ The court further held that interest paid on the interest deficiency would not constitute impermissible compound interest.⁶⁶ Com-

61. *Id.* at 524 (citing *Van Orman v. State*, 416 N.E.2d 1301 (Ind. Ct. App. 1981)).

62. *Id.*

63. *Id.*

64. *General Motors v. Indiana Dep't of State Revenue*, 578 N.E.2d 399 (Ind. Tax Ct. 1991).

65. *Id.* at 405-08.

66. *Id.* at 408.

pound interest, the court noted, is interest paid by a payor on interest the payor has previously paid.⁶⁷ By contrast, simple interest is interest paid by the payor (here the Department) on money previously paid by the payee (here GM), whether the money represents tax, interest, penalties, or some other classification.⁶⁸

Thus, taxpayers who have previously paid money to the State in the form of interest are entitled to and should seek to recover interest on that money when it is recovered. The *General Motors* decision recognizes that this is proper, and it makes sense as the taxpayer has been without that money (and the State has been able to utilize the funds) during the time period in question.

F. Property Tax

In *Glass Wholesalers, Inc. v. State Board of Tax Commissioners*,⁶⁹ a wholesaler of automobile glass sought an adjustment in its tangible personal property tax for abnormal obsolescence of inventory pursuant to Indiana Code section 50-4.1-3-9. The State Board had denied the adjustment, reasoning that neither destruction of the inventory by catastrophe nor exceptional technological obsolescence had been shown. On appeal, the tax court first explained that "[t]o receive an adjustment for abnormal obsolescence of inventory, a taxpayer must show the value of its inventory has changed, the change in value was unforeseen, and the unforeseen change in value was the result of exceptional technological obsolescence or destruction by catastrophe."⁷⁰ The tax court affirmed the denial of the adjustment, because the taxpayer produced no evidence that the change in value was unforeseen.⁷¹ The tax court further noted that obsolescence was not due to exceptional technology, in that there was still a market for the windshields, albeit at a lower price.⁷²

Separately, the tax court held that the State Board was not estopped from challenging the claimed adjustment for 1988 because of its allowance in 1987 and 1989.⁷³ Noting that estoppels against the State are disfavored, the tax court determined that the taxpayer had not relied on the State Board's representations.⁷⁴

67. *Id.*

68. *Id.*

69. 568 N.E.2d 1116 (Ind. Tax Ct. 1991).

70. *Id.* at 1120 (citing IND. ADMIN. CODE tit. 50, r.4.1-3-9; *Don Meadow Motors, Inc. v. State Bd. of Tax Comm'rs*, 545 N.E.2d 351, 352 (Ind. Tax Ct. 1989)).

71. *Id.* at 1121.

72. *Id.*

73. *Id.* at 1122-23.

74. *Id.*

In *Kentron, Inc. v. State Board of Tax Commissioners*,⁷⁵ the taxpayer appealed from the State Board's denial of the statutory interstate commerce exemption for tangible personal property taxes. The State Board had denied the exemption on the grounds of waiver, reasoning that the taxpayer had failed to comply with the procedural requirements for obtaining the exemption. On appeal, the tax court refused to consider the taxpayer's arguments on the merits of the exemption. The court reasoned that "the issues determined by the State Board are generally the only issues this court may review," and thus concluded that the "sole issue before the court concerns Kentron's waiver of the exemption."⁷⁶

On the merits of the waiver issue, the tax court then held that the taxpayer had waived the exemption.⁷⁷ Although the exemption is rooted in a constitutional right that extends to taxpayers under *Dennis v. Higgins*,⁷⁸ such rights "may be regulated by reasonable procedural requirements."⁷⁹ The tax court thus held that the exemption had been waived by the taxpayer's failure to comply with the procedures set forth in Indiana Code sections 6-1.1-10-31 and 6-1.1-11-1.⁸⁰

In the real property arena, the Indiana Supreme Court held in *St. Mary's Medical Center, Inc. v. State Board of Tax Commissioners*,⁸¹ that a nonprofit hospital was not entitled to a property tax exemption for buildings occupied by staff for private medical practices.⁸² The court thus affirmed the decision of the tax court that the use of the hospital's buildings for private medical practices was not "reasonably necessary" to the exempt purpose of providing hospital care and services to the public.⁸³ The supreme court also affirmed the tax court's rejection of the hospital's legislative acquiescence argument, noting that this doctrine is "hopelessly insoluble and useless as a tool of statutory construction" when "past administrative or judicial interpretations vary or are few in number or not widely known."⁸⁴ The court thus confirmed that this doctrine is not well received in Indiana.

Finally, in *Indiana Department of Revenue v. Felix*,⁸⁵ the Indiana Supreme Court reversed the trial court's ruling and held that Indiana's

75. 572 N.E.2d 1366 (Ind. Tax Ct. 1991).

76. *Id.* at 1371.

77. *Id.* at 1374.

78. 111 S. Ct. 865 (1991).

79. *Kentron*, 572 N.E.2d at 1372.

80. *Id.* at 1374.

81. 571 N.E.2d 1247 (Ind. 1991).

82. *Id.* at 1250.

83. *Id.*

84. *Id.*

85. 571 N.E.2d 287 (Ind. 1991), *cert. denied*, 60 U.S.L.W. 3154 (U.S. Feb. 18, 1992).

former tax on intangible property is not violative of the Commerce Clause.⁸⁶ A petition for certiorari was filed with the United States Supreme Court, and at last word, the parties had agreed to settle this multi-million dollar case.⁸⁷ According to published reports, the State feared that the Court would hear the case and strike down the law, possibly leading to a much larger award in this class action lawsuit.⁸⁸

86. *Id.* at 293.

87. *Settlement on Intangibles Tax*, INDIANAPOLIS STAR, Feb. 11, 1992, at D8.

88. *Id.*

Tort Law: The Languages of Duty

JAY TIDMARSH*

Summarizing the developments in Indiana tort law is a daunting, perhaps impossible task. In more than 115 reported opinions, state and federal courts wrestled with issues, many of them issues of first impression, which ranged across the spectrum of tort law. From physical to psychic to economic injuries, from compensatory to punitive damages, from legal doctrine to legal process, scarcely a page of Indiana's tort hornbook was left unchanged. Describing the changes in complete detail would exhaust everyone long before the work was done, while organizing the year's developments around any single theme risks the omission of cases and concepts as important as the theme chosen.

In spite of its risks, I have taken the latter approach. The reason is that a constant thread runs through many of these cases. The thread is duty. Time and again during the past year, Indiana courts were required to decide whether a particular set of facts gave rise to a duty of care by the defendant or an obligation of avoidance by the plaintiff.

Some of the cases involved novel legal duties, while others gave modern answers to time-worn problems. Whatever the ultimate result, one aspect of the decisions stands out: the courts did not resolve the issue of duty along any consistent view of the notion of obligation and responsibility. Although the Indiana Supreme Court purported to announce a comprehensive new test for the determination of duty during 1991, Indiana does not in fact have a single, coherent theory of duty. Rather, it has four competing models: a model of duty based on relationship, a model based on foreseeability of harm, a model based on public policy, and a model based on community values. Different areas of tort doctrine have been captured by different models, with the result that Indiana tort law is presently a confused patchwork of obligation and immunity.

Part I of this Article begins the exploration of this theme by describing Indiana's new test for duty. Part II examines three sets of cases decided by the Indiana Supreme Court and demonstrates that the four models of duty remain entrenched despite this new test. Part III applies these models to duty decisions in the areas of physical, psychic, and economic torts, as well as to the plaintiff's own obligation of due care, and proves that the reliance on the

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disparate models has frustrated any coherent pattern of doctrinal development in the area of duty. Part IV provides some tentative conclusions about the general direction of duty analysis in Indiana.

By focusing on this theme of duty, I am necessarily bypassing important, interesting, and occasionally inconsistent decisions regarding negligence,¹ proximate cause,²

1. See *Amcast Indus. Corp. v. Detrex Corp.*, 779 F. Supp. 1519 (N.D. Ind. 1991) (holding that the violation of an Indiana administrative regulation was evidence of negligence but not negligence per se); *Witco Corp. v. City of Indpls.*, 762 F. Supp. 834 (S.D. Ind. 1991) (holding that doctrine of *res ipsa loquitur* could apply in case in which city failed to maintain building in order to prevent vagrants from setting fire); *Adams Township of Hamilton County v. Sturdevant*, 570 N.E.2d 87 (Ind. Ct. App. 1991) (refusing to allow negligence per se claim for violation of statute when statute's purpose was not public safety); *Cochran v. Phillips*, 573 N.E.2d 472 (Ind. Ct. App. 1991) (rejecting use of *res ipsa loquitur* for escape of dog); *French v. Bristol Myers Co.*, 574 N.E.2d 940 (Ind. Ct. App. 1991) (finding negligence per se theory available when defendant failed to abide ordinance's command to keep bushes near roadway trimmed); *Hale v. Community Hosp. of Indpls., Inc.*, 567 N.E.2d 842 (Ind. Ct. App. 1991); *Hobble v. Basham*, 575 N.E.2d 693 (Ind. Ct. App. 1991) (holding unconstitutional an ordinance which defendant violated and on which plaintiff had relied to establish negligence per se); *Kerr v. Carlos*, 582 N.E.2d 860 (Ind. Ct. App. 1991) (finding that mere fact of unsuccessful first surgery did not establish a breach of the standard of care and that expert testimony was therefore required); *Nalls v. Blank*, 571 N.E.2d 1321 (Ind. Ct. App. 1991) (holding that compliance with postal regulations is not conclusive on the issue of due care, especially when the regulations are not concerned with safety); *Stackhouse v. Scanlon*, 576 N.E.2d 635 (Ind. Ct. App. 1991) (holding that chiropractor cannot give expert testimony on standard of care for internal and pulmonary medicine); *Summit Bank v. Panos*, 570 N.E.2d 960 (Ind. Ct. App. 1991) (holding that affidavit of expert who was not familiar with locality and was not a licensed physician at time of malpractice was sufficient to resist motion for summary judgment).

2. See *Cowe v. Forum Group, Inc.*, 575 N.E.2d 630 (Ind. 1991) (holding that jury could find that failure to diagnose and care for pregnant mother in defendant's care was a proximate cause of child's afflictions); *Peak v. Campbell*, 578 N.E.2d 360 (Ind. 1991) (reversible error not to give instruction on the burden of proof on proximate cause when the defendant admits negligence); *Adams Township of Hamilton County v. Sturdevant*, 570 N.E.2d 87 (Ind. Ct. App. 1991) (holding that failure of township to enforce fence repair law not a proximate cause of death of decedent who collapsed after repairing hole in neighbor's portion of fence); *Cornett v. Johnson*, 571 N.E.2d 572 (Ind. Ct. App. 1991) (holding that trial judge's testimony that evidence would have had an effect on his decision was speculative and therefore should have been excluded); *Lilge v. Russell's Trailer Repair, Inc.*, 565 N.E.2d 1146 (Ind. Ct. App. 1991) (finding that whether plaintiff's failure to put his foot on bumper was sole proximate cause of his fall from back of trailer was question of fact for the jury); *Stackhouse v. Scanlon*, 576 N.E.2d 635 (Ind. Ct. App. 1991); *Summit Bank v. Panos*, 570 N.E.2d 960 (Ind. Ct. App. 1991) (finding that patient's alleged suicide from overdose of prescription medication was not an intervening cause when the prescribing doctor knew of patient's suicidal behavior and neglected to give proper warnings regarding the use of medication); *Tucher v. Brothers Auto Salvage Yard*, 564 N.E.2d 560 (Ind. App. 1991) (finding summary judgment proper when plaintiff failed

defamation,³ nuisance,⁴ false arrest,⁵ malicious prosecution and abuse of process,⁶ statutes of limitation,⁷ sovereign

to prove that gravel on which he slipped came from defendant's salvage yard); *Walker v. Rinck*, 566 N.E.2d 1088 (Ind. Ct. App. 1991) (holding that parents' subsequent knowledge of the mother's Rh negative blood type and their decision at that time to have children was an intervening cause which precluded claim against doctor and laboratory).

3. See *Tacket v. Delco Remy Div. of Gen. Motors Corp.*, 937 F.2d 1201 (7th Cir. 1991) (holding that plaintiff must prove pecuniary damages in order to recover in libel per quod action); *Bandido's, Inc. v. Journal Gazette Co.*, 575 N.E.2d 324 (Ind. Ct. App. 1991) (stating that inaccurate headline which constituted extreme departure from the standards of journalism could be used as evidence of actual malice); *Burks v. Rushmore*, 569 N.E.2d 714 (Ind. Ct. App. 1991) (holding that medical director's allegedly defamatory comment regarding employee on disability entitled to qualified privilege); *Chambers v. American Trans Air, Inc.*, 577 N.E.2d 612 (Ind. Ct. App. 1991) (holding that reference given by former employer to prospective employer entitled to qualified privilege); *Powers v. Gastineau*, 568 N.E.2d 1020 (Ind. Ct. App. 1991) (finding that comment to county commissioners that plaintiff is a "lunatic" is defamatory and not entitled to qualified privilege because of actual malice); *Olsson v. Indiana Univ. Bd. of Trustees*, 571 N.E.2d 585 (Ind. Ct. App. 1991) (holding that reference given by teacher to prospective employer of student entitled to qualified privilege).

4. See *Witco Corp. v. City of Indpls.*, 762 F. Supp. 834 (S.D. Ind. 1991); *Blair v. Anderson*, 570 N.E.2d 1337 (Ind. Ct. App. 1991) (holding that an open pit dump which failed to comply with applicable ordinances was a public nuisance); *Pickett v. Brown*, 569 N.E.2d 706 (Ind. Ct. App. 1991) (holding that a nuisance suit is not an exception to the Indiana's "common enemy" doctrine).

5. See *Edwards v. Vermillion County Hosp.*, 579 N.E.2d 1347 (Ind. Ct. App. 1991).

6. See *Indiana Nat'l Bank v. Churchman*, 564 N.E.2d 340 (Ind. Ct. App. 1991).

7. The significant statute of limitations decisions occurred in the areas of products liability, medical malpractice, and legal malpractice. In perhaps the most important statute of limitations decision of the year, *B & B Paint Corp. v. Shrock Mfg. Inc.*, 568 N.E.2d 1017 (Ind. Ct. App. 1991), the court of appeals held that a product liability claim asserting a breach of implied warranties was governed by the four-year Uniform Commercial Code statute of limitations rather than the two-year Products Liability Act statute of limitations. The issue has resulted in a significant divergence of opinion in other jurisdictions, see *Taylor v. Ford Motor Co.*, 408 S.E.2d 270 (W. Va. 1991), but had apparently never been addressed in Indiana.

The most fascinating series of opinions, however, concerned the application of the discovery rule in products liability and malpractice cases. As a general matter, the discovery rule holds that a statute of limitations begins to run on the date on which the plaintiff discovers or reasonably should discover the relationship between the defendant's actions and the injury. In *Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215, 1226 (10th Cir. 1991), the Tenth Circuit held that the discovery rule does not apply in all products liability cases; rather, it is limited only to those cases in which injury results from "the ill effects of long term chemical exposure." The *Alexander* court upheld this reading of the discovery rule, which effectively limits the discovery rule just to toxic tort claims, against an equal protection challenge. In another products liability case, the Indiana Supreme Court applied the discovery rule exception to the two-year statute of limitations and found that, although the plaintiff did not actually discover the relationship between the product and his injury until a date within the two-year period, there was a jury question about whether the plaintiff should have known about the relationship at a date outside the two-year period. *Allied Resin Corp. v.*

immunity,⁸ preemption,⁹ compensatory¹⁰ and punitive

Waltz, 574 N.E.2d 913 (Ind. 1991).

When the discovery rule was applied in medical malpractice cases, however, the result was different. In *Yarnell v. Hurley*, 572 N.E.2d 1312 (Ind. Ct. App. 1991), the court held that the two-year statute of limitations begins to run at the date of malpractice, but is tolled for an equitable period of time when there is evidence of fraudulent concealment or continuous wrong. The court held that a 21-month delay in bringing a malpractice claim after discovery of the fraud was unreasonable and that the defendant's continuous wrong ended when the physician-patient relationship ended, which had occurred more than two years before the filing of the proposed malpractice complaint. Similarly, *Keesling v. Baker & Daniels*, 571 N.E.2d 562 (Ind. Ct. App. 1991), held in a legal malpractice case that the two-year statute of limitations on a claim of malpractice due to conflict of interest begins to run, at the latest, on the last date of the attorney's representation. The most stringent statute of limitations decision, however, was *Madlem v. Arko*, 581 N.E.2d 1290 (Ind. Ct. App. 1991), in which the court held that a claim for malpractice begins to run on the date of the malpractice and that there is no discovery rule which tolls the statute until the time when the client discovers the malpractice. The direct conflict between *Madlem* and *Keesling*, as well as *Madlem*'s general inconsistency with the trend toward adoption of discovery rules, is a development which should continue to be monitored.

8. See *Witco Corp. v. City of Indpls.*, 762 F. Supp. 834 (S.D. Ind. 1991); *Buckley v. Standard Inv. Co.*, 581 N.E.2d 920 (Ind. 1991) (holding that utility is not entitled to immunity under the Indiana Tort Claims Act for negligent inspection); *Board of Trustees v. Henry*, 576 N.E.2d 614 (Ind. Ct. App. 1991) (holding that the statements regarding the extent of loss provided sufficient notice to satisfy Tort Claims Act's claim presentation requirement); *City of Valparaiso v. Edgecomb*, 569 N.E.2d 746 (Ind. Ct. App. 1991) (finding that police officer involved in car accident while leading funeral procession was entitled to immunity); *Edwards v. Vermillion County Hosp.*, 579 N.E.2d 1347 (Ind. Ct. App. 1991) (holding that hospital is entitled to immunity of Indiana Tort Claims Act after its instigation of a debt collection action); *Hupp v. Hill*, 576 N.E.2d 1320 (Ind. Ct. App. 1991) (finding that judge *pro tem* was entitled to immunity under Indiana Tort Claims Act for signing warrant minutes after his commission had expired); *State v. Hughes*, 575 N.E.2d 676 (Ind. Ct. App. 1991) (holding that plaintiff's physical injuries, did not excuse her failure to file a notice of claim within 180 days of the injury); *Tucher v. Brothers Auto Salvage Yard*, 564 N.E.2d 560 (Ind. Ct. App. 1991).

9. See *Heath v. General Motors Corp.*, 756 F. Supp. 1144 (S.D. Ind. 1991) (holding that design defect claim of failure to equip car with air bag preempted by federal motor vehicle safety standards); *Smith v. Norfolk & Western Ry. Co.*, 776 F. Supp. 1335 (N.D. Ind. 1991) (finding that alleged negligence in failing to provide additional warning devices at railroad crossing preempted by Federal Railway Safety Act).

10. Undoubtedly the most important opinion on compensatory damages was *Southlake Limousine & Coach, Inc. v. Brock*, 578 N.E.2d 677 (Ind. Ct. App. 1991), in which the plaintiff used an economist to testify about his calculations of the economic value of a person's life ("hedonic damages"). The court of appeals held that this type of testimony is inadmissible in a wrongful death suit because it is irrelevant to the issues of loss of love, guidance, and mental anguish; because it is speculative as to the losses of the survivors; and because it invades the jury's province in assessing damages. Other opinions worthy of note are: *Chamness v. Carter*, 575 N.E.2d 317 (Ind. Ct. App. 1991) (holding that a noncustodial parent can file a wrongful death action on behalf of the deceased child when the custodial parent refuses to do so); *Eden United, Inc. v. Short*, 573 N.E.2d 920 (Ind. Ct. App. 1991)

damages,¹¹ indemnity,¹² assignability of claims,¹³ vicarious liability,¹⁴ strict liability,¹⁵ and the jury process.¹⁶ I do so with great reluctance.

(describing the level of certainty needed in order to obtain damages for tortious interference with prospective advantage); *Smith v. Syd's, Inc.*, 570 N.E.2d 1216 (Ind. Ct. App. 1991) (holding that court incorrectly excluded testimony of \$26,000 in medical expenses suffered by the plaintiff).

11. See *Mundell v. Beverly Enter.-Ind., Inc.*, 778 F. Supp. 459 (S.D. Ind. 1991) (holding that personal representative of decedent could not recover punitive damages for improper care received by decedent); *Erie Ins. Co. v. Hickman*, 580 N.E.2d 320 (Ind. Ct. App. 1991); *Powers v. Gastineau*, 568 N.E.2d 1020 (Ind. Ct. App. 1991) (holding that punitive damage award must be reversed because of a failure to demonstrate malice, fraud, gross negligence, or oppression); *Hotel Operating Co. v. Shaffer*, 580 N.E.2d 306 (Ind. Ct. App. 1991) (discussing the foundation needed to permit introduction of evidence on net worth of defendant and to pierce the corporate veil); *Ramada Robbins v. McCarthy*, 581 N.E.2d 929 (Ind. Ct. App. 1991) (holding that punitive damages could be awarded even when defendant had already been subject to criminal sanctions); *Swain v. Swain*, 576 N.E.2d 1281 (Ind. Ct. App. 1991) (holding that constructive fraud supported award of punitive damages where there was evidence of oppression).

With one exception, however, the courts missed the most pressing issue under punitive damages. After the United States Supreme Court's decision in *Pacific Mutual Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), it appears that the punitive damages rules of each state will need to be examined to determine whether they comport with the due process guarantees which *Haslip* found in the Alabama case before the Court and which the majority strongly implied were required to render an award of punitive damages constitutional. The only case to raise the issue of the constitutionality of Indiana's punitive damages rules held that they were constitutional because *Haslip* determined that awards of punitive damages are constitutional as long as the court considers the character and degree of the wrong and the necessity of preventing similar wrongs. *United Farm Bureau Mut. Ins. Co. v. Ira*, 577 N.E.2d 588 (Ind. Ct. App. 1991). The court's reading of *Haslip* is extremely generous and probably incorrect. See *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991). But see *Hospital Auth. of Gwinnett County v. Jones*, 409 S.E.2d 501 (Ga. 1991).

12. See *Allied Signal, Inc. v. Acme Serv. Corp.*, 946 F.2d 1295 (7th Cir. 1991); *Sprigler v. Osnabrucker Metallwerke*, 761 F. Supp. 86 (S.D. Ind. 1991); *Indianapolis Power & Light Co. v. Snodgrass*, 578 N.E.2d 668 (Ind. 1991) (holding that Indiana Comparative Fault Act creates no right of indemnity against employer of plaintiff).

13. See *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991) (holding that legal malpractice claim cannot be validly assigned to victorious plaintiff as part of a discharge of defendant's debts in bankruptcy).

14. See *Bitzer v. Pradziad*, 571 N.E.2d 593 (Ind. Ct. App. 1991); *Eden United, Inc. v. Short*, 573 N.E.2d 920 (Ind. Ct. App. 1991) (piercing corporate veil to hold subsidiary organizations liable for parent organization's interference with plaintiff's economic advantage).

15. See *Amcast Indus. Corp. v. Detrex Corp.*, 779 F. Supp. 1519 (N.D. Ind. 1991).

16. The most significant opinion was probably *Frito-Lay, Inc. v. Cloud*, 569 N.E.2d 983 (Ind. Ct. App. 1991), in which the court found that the failure to give a sudden emergency instruction required reversal of a judgment entered in favor of a teenager who failed to yield at a stop sign and was struck by the defendant's driver. Calling the plaintiff's reasons for a nonbifurcated trial "mere subterfuge," the court held that the compelling damages testimony evoked such sympathy for the plaintiff that the defendant was unduly prejudiced by a nonbifurcated trial and that a bifurcated trial would maximize judicial

1991 was a year of rich diversity in Indiana tort law. Ultimately, however, it was the year of duty.

I. A NEW TEST FOR DUTY?

Michael Neal was a patient of Dr. Orville Webb. At some point before 1985, Dr. Webb began to prescribe anabolic steroids for Neal. On March 27, 1985, Neal brandished a knife at his wife, pointed a gun at her head, and pulled the trigger. Fortunately the gun was unloaded, and Ms. Neal escaped to the home of her sister and brother-in-law. Her brother-in-law, a state trooper, called the sheriff's office, which in turn called Dr. Webb. Dr. Webb went to the Neals' home and found Neal distraught and afraid he might hurt someone. Dr. Webb convinced Neal to see a psychiatrist the next day and then called the sheriff's office to report that it would be better if everyone stayed away from Neal for the night. The sheriff's office subsequently called Ms. Neal and told her that everything was fine. Ms. Neal called her husband, who said that she could come over to pick up some clothes for the night. When Ms. Neal and her brother-in-law arrived at the home, Neal threatened his wife with a gun, shot the brother-in-law, and drove to a local hospital, where he killed a nurse.

The brother-in-law and his wife sued Dr. Webb. The plaintiffs' theory of the case was that Neal had become a toxic psychotic because of Dr. Webb's negligent over-prescription of anabolic steroids. As the Indiana Supreme Court framed it, the legal issue presented by the case was "[w]hat duty a physician owes to a third person injured by the physician's patient as a result of treatment."¹⁷ The issue was new; no prior precedent dictated the result.

To answer the novel issue, the supreme court began by asking a logical question: What is the test for determining whether a duty in tort exists? Although obvious, the question was also revolutionary. Indiana

economy. *Id.* at 990-91. *But see* Fultz v. Cox, 574 N.E.2d 956 (Ind. Ct. App. 1991) (declining to follow *Frito Lay* and refusing to bifurcate issue of prior release in car accident case).

Courts were also active in reviewing damage awards and liability findings which were arguably the product of "jury justice." *See, e.g.,* Adams v. McClevy, 582 N.E.2d 915 (Ind. Ct. App. 1991); Conklin v. Demastus, 574 N.E.2d 935 (Ind. Ct. App. 1991) (upholding jury verdict for defendant when defendant's lawyer conceded that defendant was more than 50% at fault, but there was a serious question that the plaintiffs' injuries were caused by other events); Schuh v. Silcox, 581 N.E.2d 926 (Ind. Ct. App. 1991) (ordering new trial in case where jury returned verdict for defendant after defendant's lawyer conceded liability in opening statement); State v. Snyder, 570 N.E.2d 947 (Ind. Ct. App. 1991).

17. Webb v. Jarvis, 575 N.E.2d 992, 993 (Ind. 1991).

cases had long recognized the need of a tort plaintiff to establish a duty,¹⁸ but no single test to determine the existence of a duty had ever been established.¹⁹ Rather, various duties—such as the duty of a landowner to an invitee or licensee,²⁰ the duty of care for the actions of contractors,²¹ the duty of a motorist,²² the duty to prevent criminal conduct,²³ the duty of a seller or supplier of alcohol,²⁴ even the duties of physicians²⁵ and product manufacturers²⁶—grew up independently and haphazardly, without any thought given to their relationship to other tort obligations arising in other factual contexts. By asking a simple question, the Indiana Supreme Court was poised to bring the unruly duty analysis, full of its technicalities and exceptions, within a single framework.

The court's answer was straight-forward. In determining whether a duty existed in the case, "three factors must be balanced . . . (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns."²⁷ Applying these three factors to the facts of the case, the court found that all three counseled against the imposition of a duty.²⁸ Consequently, it held that "generally physicians do not owe a duty to unknown nonpatients who may be injured by the treatment of a patient."²⁹

In spite of its apparent simplicity, this new test for duty suffers from three serious flaws. The first is that the court provided less than two paragraphs of discussion and no precedential or theoretical analysis for its new test. The lack of analysis and justification robbed this new framework of much of its prescriptive power and force.

The second weakness of the test is a problem shared by all multi-factor balancing tests: lack of certainty and undue pliability. When all

18. See, e.g., *Miller v. Griesel*, 308 N.E.2d 701, 706 (Ind. 1974).

19. See, e.g., *Gariup Constr. Co. v. Foster*, 519 N.E.2d 1224 (Ind. 1988).

20. See *Cleveland C.C. & St. L. Ry. Co. v. Means*, 104 N.E. 785 (Ind. App. 1914).

21. See *Prest-O-Lite Co. v. Skeel*, 106 N.E. 365 (Ind. 1914); *Hale v. Peabody Coal Co.*, 343 N.E.2d 316 (Ind. App. 1976).

22. See *Martin v. Lilly*, 121 N.E. 443 (Ind. 1919).

23. See *infra* notes 116-25 and accompanying text.

24. See *Picadilly, Inc. v. Colvin*, 519 N.E.2d 1217 (Ind. 1988); *Gariup Constr. Co. v. Foster*, 519 N.E.2d 1224 (Ind. 1988).

25. See *Worster v. Caylor*, 110 N.E.2d 337 (Ind. 1953).

26. See *J.I. Case Co. v. Sandefur*, 197 N.E.2d 519 (Ind. 1964).

27. *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991).

28. The court cautioned, "This conclusion should not be interpreted as inoculating physicians so as to give them complete immunity against third party claims. In a different factual setting, the duty analysis undertaken here could lead to a different conclusion." *Id.* at 998.

29. *Id.*

three factors pull in the same direction, the answer to the duty question is always easy. When factors tug in different directions, however, the courts will necessarily be forced to do one of two things: either manipulate the meaning and evidence concerning the discordant factor in order to create an appearance that all three factors support the decision or establish a "lexical" or serial ordering in which some factors are given priority or greater weight.³⁰ In *Webb v. Jarvis*,³¹ the court appears to have adopted the former approach. With respect to the first factor (relationship), the Indiana Supreme Court noted that, although privity "has vanished evolutionarily during the twentieth century" and that "[a]s we approach the next century, it is well-established that privity is not always required,"³² the lack of professional relationship between the plaintiff and the physician compels a finding of no duty unless the professional knows that a third person is relying on his opinions and conclusions.³³ By focusing on the relationship between the plaintiff and the physician, the court failed to appreciate that the existence of a relationship between a physician and a patient can also give rise to obligations toward others.³⁴

Similarly, with respect to the second factor (foreseeability), the court rejected the plaintiff's analogy to dram shop cases which find a duty on the tavern for a patron's drunken conduct;³⁵ it noted that the toxic dangers of steroids are less widely known, and therefore, less foreseeable than the dangers of selling someone too much alcohol.³⁶ Here too, the court's argument is thinly reasoned. The consequences of excessive steroid use might well have been known to the defendant as a medical professional. If the court intended to suggest that a defendant owes no duty for harm which it can foresee simply because the general public, with less expertise than the defendant, cannot foresee the harm, then

30. By "lexical" or serial ordering, I mean that the court will need to acknowledge that certain factors are dominant and others are subservient in the case of a conflict. For instance, if public policy considerations favored a duty while relationship and foreseeability did not, the court would need to determine which set of factors deserved the priority. On the more general question of lexical ordering, see JOHN RAWLS, *A THEORY OF JUSTICE* 42-44 (1971).

31. 575 N.E.2d 992 (Ind. 1991).

32. *Id.*

33. *Id.* at 996. In this case, there was no evidence that the plaintiff had relied on the defendant's conclusions and opinions or that the defendant knew of any arguable reliance.

34. See *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (holding that relationship of doctor to patient creates obligation of due care toward specific target of patient's violent ideation); *RESTATEMENT (SECOND) OF TORTS* § 315 (1965).

35. *Webb*, 575 N.E.2d at 997. The court did not specifically cite any dram shop cases, but it was presumably thinking of *Picadilly, Inc. v. Colvin*, 519 N.E.2d 1217 (Ind. 1988).

36. *Webb v. Jarvis*, 575 N.E.2d 992, 997 (Ind. 1991).

the foreseeability factor will work against the creation of duties for significant classes of injuries caused by technological innovations.

Finally, the court turned to public policy, where it stood on the firmest ground. The court found that the negative effects of a duty on a physician's loyalty to a patient and on the generally beneficial use of prescription medication were policy reasons which weighed heavily against the duty.³⁷ Although these arguments are persuasive, the court ignored countervailing public policy factors such as the compensation of plaintiffs and the deterrence of negligent prescription. The court gave no reason that the public policies it selected were the critical ones.

That problem leads to the third weakness of *Webb*: whether in fact the new test of duty will be taken seriously. Less than a month after *Webb* was decided, the supreme court decided *Cowe v. Forum Group, Inc.*,³⁸ a case involving a child born to a woman raped in the defendant's institutional care facility. The case, in which the child sued on a theory of wrongful life, bore significant parallels to *Webb*: both involved a professional relationship, both involved third party criminal conduct, and both claimed an asserted duty to protect. Both held that no duty existed. In many ways, however, the most remarkable thing about *Cowe* is that it utterly fails to cite *Webb* or to undertake the three-factor balancing test which *Webb* seemingly requires. The duty analysis adopted in *Cowe* is considered shortly. At this point it is enough to note that the court ignored the *Webb* test in its first opportunity to use it.

This last observation—that courts have not and may not accept the *Webb* balancing test—leads to a further question: If the courts are not deciding duty issues with *Webb's* test, then what are the factors on which courts are basing their duty decisions? Again using cases decided during the past year, the next section explores the models on which the Indiana courts have premised the existence of a legal duty.

II. FOUR MODELS OF DUTY

With few exceptions, Indiana's duty decisions during 1991 turned on one of four critical factors. Some cases relied on the nature of the relationship between the defendant and the plaintiff (or third person) in order to resolve the duty issue, some relied on the failure of due care, some relied on public policy, and at least one relied on a sense of community values. The first three factors are familiar; they are the ones identified in *Webb*. The difference from *Webb*, however, is that the presence or absence of a single factor was typically deemed dispositive of the duty question; the courts did not engage in the balancing of

37. *Id.*

38. 575 N.E.2d 630 (Ind. 1991).

factors suggested by *Webb*. The fourth factor, of course, lies entirely outside the *Webb* framework. By examining three series of cases decided by the Indiana Supreme Court, this section develops the four ways in which Indiana courts have analyzed the question of duty.

A. The Model of Relationship and Control: Landowner Liability Toward Those Injured on the Property

At common law the paradigmatic instance of a duty based on relationship was the duty of a landowner toward those injured on the landowner's property. Simply put, the relationship of the person entering on the land to the landowner—in other words, the injured person's status as invitee, licensee, or trespasser—defined the duty owed. Invitees were owed a general duty of reasonable care; licensees, which included all social guests, were owed a duty only to avoid wilful or wanton injury and to warn of latent dangers; and trespassers received a duty simply to avoid wilful or wanton injury.³⁹ The rule in Indiana was the same.⁴⁰

In the past twenty-five years, however, this status-driven test has come under increasing attack for its arbitrary character and its finespun distinctions. Consequently, it has been replaced in a substantial number of jurisdictions with a general duty of reasonable care under the circumstances.⁴¹

In a series of five decisions, the Indiana Supreme Court entered the debate about the nature and extent of a landowner's duty to those injured on the premises.⁴² It struck a middle ground, significantly reworking and expanding the present "invitee" category but nonetheless

39. See RESTATEMENT (SECOND) OF TORTS §§ 328E-344 (1965). A fourth status-based distinction has been developed through legislation; every state has some form of a recreational use statute, in which landowners who hold land open for certain recreational purposes owe the entrants on the land a limited duty of care. See, e.g., IND. CODE §§ 14-1-3-18, -19 (1988 & Supp. 1991) (limiting duty of landowner toward users of recreational vehicles and snowmobiles entering on the land).

40. See *Burrell v. Meads*, 569 N.E.2d 637 (Ind. 1991).

41. See, e.g., *Rowland v. Christian*, 433 P.2d 561 (Cal. 1968); *Basso v. Miller*, 352 N.E.2d 868 (N.Y. 1976); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 62 (5th ed. 1984) (discussing fate of *Rowland* in other jurisdictions).

42. *Burrell*, 569 N.E.2d at 637; *Parks v. Parks*, 569 N.E.2d 644 (Ind. 1991); *Risk v. Schilling*, 569 N.E.2d 646 (Ind. 1991); *LeLoup v. LeLoup*, 569 N.E.2d 648 (Ind. 1991); *Beresford v. Starkey*, 571 N.E.2d 1257 (Ind. 1991). The first four cases were decided on the same day; subsequently, *Beresford* reversed a court of appeals judgment which had been rendered prior to the decision in *Burrell* and its progeny. *Burrell* involved a plaintiff injured while helping his neighbor remodel his garage. *Parks* involved a plaintiff injured while helping his brother build a carport at the brother's home. *Risk* involved a plaintiff injured while helping the defendant restore an antique tractor in the defendant's shop. *LeLoup* involved a son injured while returning a wrench to his father's home. *Beresford* involved a friend injured while diving off the defendant's dock during a party.

retaining the three status-based categories as the fundamental determinant of duty. The lead opinion, *Burrell v. Meads*,⁴³ enlarged the invitee category in two ways. First, it clarified the basic test for the determination of invitee status. Confusion in Indiana precedents over the proper test for invitee (the earlier "invitation test" as opposed to the subsequently developed "economic benefit" test) left the scope of the invitee category extremely murky. After definitively rejecting the "economic benefit" test because of the "sense late in this century that the economic benefit test promotes injustice when applied to social guest cases," *Burrell* held that the correct test for determining invitee status is the invitation test.⁴⁴

Second, the court clarified the types of persons who are invitees entitled to claim this general duty of reasonable care. In the first instance, the "invitee" category now includes both public invitees (members of the public invited onto the land "for a purpose for which the land is held open to the public")⁴⁵ and business visitors (persons invited onto the land "for a purpose directly or indirectly connected with business dealings with the possessor of the land").⁴⁶

More significant, however, was *Burrell*'s expansion of the invitee class to include social guests. Under traditional analysis, social guests were neither public invitees nor business visitors; they were only licensees.⁴⁷ Nonetheless, starting from the newly declared test for invitee status—the existence of an invitation—the court found no basis to distinguish between those persons invited for social reasons and those invited for business or public reasons. The claim that social guests can expect no more from a friend's home than the friend himself "simply does not comport with modern social practices."⁴⁸ Rather, persons typically prepare their premises more carefully for social guests than for public or business invitees, and the social guest is equally entitled to rely on the expectation that the premises are safe.⁴⁹ Therefore, the court held, landowners owe a duty of reasonable care to "all individuals known to the landowner who [come] to the premises upon actual invitation or arguably upon standing invitation."⁵⁰

Although certainly expanding the number of persons entitled to expect a duty of reasonable care, the decisions in *Burrell* and its progeny should

43. 569 N.E.2d 637 (Ind. 1991).

44. *Id.* at 642.

45. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 332 (1965)). These categories of business visitors and public invitees are standard in most jurisdictions which retain the status-based duties.

46. *Id.*

47. RESTATEMENT (SECOND) OF TORTS § 330 cmt. g (1965).

48. *Burrell v. Meads*, 569 N.E.2d 637, 643 (Ind. 1991).

49. *Id.*

50. *Id.*

not be read to represent a victory for a model of due care. Although it tinkers with the categories, *Burrell* retains the three classifications of invitee, licensee, and trespasser. When combined with the court's focus on the existence of an invitation, this classification scheme suggests that the duty of reasonable care cannot be extended to uninvited solicitors, public officers, and trespassers. *Risk v. Schilling*⁵¹ suggests another significant limitation on the landowner's duty of care. In *Risk*, the plaintiff was a social guest injured in a workshop under the exclusive control of the occupier of the land. Although the court found that the possessor owed a duty of reasonable care, it further held that a landowner who is not in possession or control of land does not owe a duty of care to persons invited onto the land by the possessor.⁵² Therefore, a model of relationship between the parties (as defined by invitation and control) is the key determinant of the duty owed to those injured on the land. Invitation and control, not due care under the circumstances, are the language of liability.

B. The Model of Due Care: Landowner Liability Toward Those Injured Off the Land

A different model for the determination of duty was suggested by the court in *Valinet v. Eskew*.⁵³ In *Valinet*, a dead 190-year-old oak fell across a road in a residential area of Hamilton County and seriously injured the plaintiff. The plaintiffs' evidence suggested that the tree had been dying for eight to twelve years and had finally died three to five years before the injury. The evidence also showed that the defendant

51. 569 N.E.2d 647 (Ind. 1991).

52. *Id.* at 647-48. The same expansion of duty within the model of relationship is also apparent from three appellate court decisions which granted invitee status to injured plaintiffs who were arguably licensees. In *Mead v. Salter*, 566 N.E.2d 577 (Ind. Ct. App. 1991), a plaintiff who forgot the address of his attorney's office entered a building to see if his attorney's name was listed in the lobby's directory. The court found that the plaintiff was an invitee because, even though his attorney did not have offices in the building, the lobby was held open to members of the public. In *Markle v. Hacienda Mexican Restaurant*, 570 N.E.2d 969 (Ind. Ct. App. 1991), a plaintiff entered the defendant's parking lot to eat dinner, but stopped to talk to a friend who agreed to take some business supplies for the defendant. Even though the plaintiff was injured while handing the friend the business supplies, the court held that his status did not automatically change from business visitor to licensee. Because a jury could find that the incidental use of the parking lot for the defendant's own purposes was foreseeable, the plaintiff's status (and thus the duty of care owed him) was a fact issue to be resolved by the jury. In *Smith v. Syd's, Inc.*, 570 N.E.2d 126 (Ind. Ct. App. 1991), a tenant who fell down a stairway jointly owned and maintained by the landlord and the owner of the adjoining building was found to be an implied invitee of the owner of the adjacent building, even though the adjacent owner derived no direct economic benefit from the plaintiff's rent.

53. 574 N.E.2d 283 (Ind. 1991).

made periodic trips to his property. Prior to *Valinet*, the rule in Indiana was that a landowner owed no obligation to those injured off the property by a natural condition on the property.⁵⁴ As the court noted, this rule “arose at a time when land was largely unsettled and the burden imposed on a landowner to inspect it for safety was held to exceed the societal benefit of preventing possible harm to passersby.”⁵⁵ With modern “urban landowners,” however, “the risk of harm to highway users is greater and the burden of inspection on landowners is lighter in such populated areas.”⁵⁶ Acknowledging the trend of other courts and the Restatement, the court imposed a duty on landowners in “an area of sufficient population density” to “inspect their trees to try to prevent their posing an unreasonable risk of harm to passing motorists.”⁵⁷

Like *Burrell*, *Valinet* does not entirely replace existing landowner obligations with a duty of reasonable care. The case does not change the rule of no liability for property owners in less populated areas, nor does it change the rule of no liability for conditions other than trees.⁵⁸ If *Valinet*’s rationale is taken seriously, however, it is difficult to believe that these areas of no liability can survive. In even the most rural areas, the harm caused by a failure to take care might strongly outweigh the precautions needed to prevent harm; the same is certainly true of natural conditions other than trees.

The most significant aspect of *Valinet*, however, is its relationship to *Burrell*. In many ways, the parallels between *Burrell* and *Valinet* are striking. Both involve the obligations of landowners. Both find that the prior duty rules for landowners ill reflect modern social circumstances. Both impose duties of reasonable care on defendants.

Indeed, given their similarities, it seems incredible that *Valinet* never cites *Burrell*, which was decided less than three months before. The explanation for the silent treatment is simple. In the final analysis, one difference between the cases outweighs their similarities: the model under

54. The duty with respect to artificial conditions maintained on the land toward those injured off the land is one of reasonable care, at least where the condition is not abnormally dangerous. See RESTATEMENT (SECOND) OF TORTS §§ 364-69 (1965). For a recent application of this rule, see *Suslowicz v. Mielcarek*, 571 N.E.2d 1304 (Ind. Ct. App. 1991).

55. *Valinet*, 574 N.E.2d at 285.

56. *Id.*

57. *Id.*

58. There is a possible caveat to this statement: in dicta, the court mentioned that some courts also departed from the rule of nonliability for natural conditions when the landowner had actual knowledge of the danger. *Id.* Although it is not clear whether the court intended this observation to become another exception to the rule of nonliability, the creation of such an exception would be consistent in most instances with the *Valinet* court’s reasoning.

which they resolve the duty issue. *Burrell* relies on relationship, particularly invitation and control, to define duty. *Valinet* relies on a model of due care: the obligation to use care exists whenever the expected harm outweighs the expected benefits. This balance of harm against benefit is, of course, simply one way of describing negligence.⁵⁹ Thus, *Valinet*'s approach ultimately collapses the questions of duty and negligence into each other; both the duty of care and the existence of negligence are determined by asking the same question.⁶⁰

Without a consistent, overarching theory of duty, the Indiana Supreme Court simply failed to appreciate the conceptual link between the cases. Rather, the facts of *Burrell*, an injury on the land, invoked one paradigm of duty. The facts of *Valinet*, an injury off the land, invoked a different paradigm. The supreme court is obviously appealing to different models in seemingly related types of factual occurrences; the problem lies in discerning its reasons for speaking more than one language. None is apparent from either *Burrell* or *Valinet*.

Whatever the explanation, the breadth of *Valinet*'s model of due care now poses a critical question for duty analysis in Indiana. By staking the rule of *Valinet* on the rationale that duties exist when the expected harm outweighs the cost of precautions, the Indiana Supreme Court ultimately paves the way for a landowner's duty of reasonable care under the circumstances—both in the context of landowner liability toward those injured *off* the property and in the context of landowner liability toward those injured *on* the property.⁶¹ Whether *Valinet* ultimately sounds the death knell for the remaining no-duty rules of landowner liability and for the invitee-licensee-trespasser categories already weakened by *Burrell* is now the pressing issue in landowner liability. Of

59. See *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947); Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 42-44 (1915).

60. This approach to the issue of duty was first advocated by Lord Esher in his famous concurrence in *Heaven v. Pender*, 11 Q.B.D. 503 (1883):

[W]henver one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

Id. at 509. It also underlies Judge Cardozo's famous equation of foreseeability of harm and relationship in *Palsgraf v. Long Island Railroad*, 162 N.E. 99, 100 (N.Y. 1928) ("The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation . . .").

61. Whether the expected harm outweighs the cost of precaution is, of course, simply one way of deciding the issue of negligence. See *Carroll Towing*, 159 F.2d at 169. To use the same inquiry to decide the issue of duty ultimately collapses the questions of duty and breach.

even greater importance is the effect of *Valinet's* analysis across the spectrum of tort duties.

C. *The Model of Public Policy: Liability for Wrongful Life*

A legal realist would probably have little difficulty explaining the disparate analysis in *Burrell* and *Valinet*: the Indiana Supreme Court was simply using legal rubric ("relationship" or "due care") to mask the results which the court wished to achieve for reasons of public policy.⁶² Although the point is debatable as a general matter, there is no doubt that the Indiana Supreme Court has, in at least some instances, relied explicitly on a model of public policy to define the duty owed. In *Cowe v. Forum Group, Inc.*,⁶³ a profoundly retarded woman was raped in the defendant's institutional care facility. The woman gave birth to a boy with physical and mental impairments. The boy then brought two claims: negligence in the failure to protect his mother from rape and negligence in failing to diagnose his mother's condition until the fifth month of her pregnancy. For the first claim, the boy alleged that the damages suffered were the loss of a relationship with his birth mother; for the second claim, the damages were the physical and mental impairments he suffered as a lack of early and adequate treatment for his mother's pregnancy.

The supreme court rejected the first claim on public policy grounds. According to the court, the primary arguments against a "wrongful life" theory were that life, even life with a genetic defect, was not a damage in comparison to no life and that it was impossible to calculate the damages of an impaired life as opposed to no life.⁶⁴ The policy arguments favoring the duty were alleviation of the parents' financial burden, discouragement of malpractice, and the fostering of genetic counseling.⁶⁵ Because it believed that the latter policies were better left to the legislature,⁶⁶ the court held that "life, even life with severe defects, cannot

62. There is at least some evidence that this was in fact occurring. In both cases, the court mentioned, although it did not explicitly rely on, the fact that modern social conditions made the former duties no longer tolerable. For a general discussion of the role of public policy in shaping the nature and extent of legal obligations, see, e.g., KEETON, *supra* note 41, §§ 3, 53.

63. 575 N.E.2d 630 (Ind. 1991).

64. *Id.* at 634.

65. *Id.* at 634-35.

66. *Id.* at 635. Of these three objectives, the fostering of genetic counseling was not implicated on the facts of the case. Contrary to the court's assertion, that the discouragement of malpractice and other negligence is not a matter typically left to the legislature.

be an injury in the legal sense.”⁶⁷ The languages of relationship and due care did not enter into the court’s calculus.

The same appeal to public policy permeated a court of appeals decision, rendered before *Cowe*, which also held that wrongful life and wrongful birth claims could not be brought in Indiana. In *Walker v Rinck*,⁶⁸ a laboratory and a doctor who negligently diagnosed a woman as Rh positive were sued for the damages to the children caused by the fact that the woman was Rh negative. Relying on the public policy analysis of *Albala v. City of New York*,⁶⁹ the court found that pre-conception torts would create unmanageable and potentially massive liability, that such torts lacked precedential support, and that the issue was better addressed by the legislature. Appealing to the model of due care, a vigorous dissent argued that a duty existed because the injury was foreseeable. The majority’s appeal to the model of public policy, subsequently endorsed by *Cowe* for injuries of this type, carried the day.

From the perspective of duty analysis, however, the critical aspect of *Cowe* was not just its reliance on a public policy model. The plaintiff had also asserted a second, distinct claim for negligent failure to diagnose and treat his mother’s pregnancy. The court’s holding on the first claim would suggest that the second claim should have been dismissed on the same public policy grounds: life, even damaged life, is no damage, and in any event, the difference between the plaintiff’s life and the condition in which he would otherwise have been born was incalculable. On the second claim, however, the court held that the nursing home had a duty of reasonable care to diagnose the mother’s condition and that the child could sue for damages which resulted from a breach of that duty. In making this decision, the court did not rely on the models of relationship, due care, or public policy; it used a fourth language of duty.

D. The Model of Community Values: Liability for Negligent

Infliction of Harm to the Unborn

In finding that the defendant in *Cowe* owed a duty of diagnosis and treatment to the plaintiff, the court’s duty analysis was simple: a duty exists “where, in general, people would recognize it and agree that it exists.”⁷⁰ It noted the trend of courts and the Restatement to impose

67. *Id.* (quoting *Azzolino v. Dingfelder*, 337 S.E.2d 528, 532 (N.C. 1985)).

68. 566 N.E.2d 1088 (Ind. Ct. App. 1991).

69. 429 N.E.2d 786 (N.Y. 1981).

70. *Cowe v. Forum Group Inc.*, 575 N.E.2d 630, 636 (Ind. 1991) (quoting *Gariup Constr. Co. v. Foster*, 519 N.E.2d 1224 (Ind. 1988)). *Gariup*’s phrasing is identical to the language found in *KEETON*, *supra* note 41, § 53, at 359 (“No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists.”).

liability when a defendant negligently causes harm to the mother.⁷¹ Then, limiting itself at least for the present time to the facts of the case, the court found that the child could assert a claim for his prenatal damage when his mother was extremely dependent on the defendant for care and protection and the defendant exercised complete control over the discharge of that obligation.⁷²

A strong argument can be made that this second holding of *Cowe*, with its discussion of dependence and control, actually fits within the model of relationship. On the facts, of course, that argument is unassailable—at least assuming that the concept of relationship does not get the narrow reading given to it in *Webb v. Jarvis*.⁷³ However, the court's analysis—whether reasonable people in the community would impose the duty—ultimately suggests a source of duty different than relationship, due care, or public policy. Rather, duties spring from the community's shared values. In many circumstances, the community's values will be shaped by notions of relationship, due care, or public policy, but those values might also be grounded in entirely different concerns.⁷⁴ In spite of its drawbacks, the model of community values

71. *Cowe*, 575 N.E.2d at 636-37. See RESTATEMENT (SECOND) OF TORTS § 869 (1965).

72. *Cowe*, 575 N.E.2d at 637.

73. Indeed, *Cowe* begins its analysis of the failure to render medical care issue by stating that "[t]he question of whether a duty to exercise care arises is governed by the relationship between the parties." *Id.* at 636. If *Webb's* analysis of relationship is correct, the absence of privity between the defendant and the fetus and the defendant's lack of knowledge about the fetus's arguable reliance on the defendant for health care, would doom the argument that a relationship which could sustain a duty existed. See *supra* notes 33-34 and accompanying text.

74. There are significant problems with a duty based on consensus values. The relevant community must be identified, its values must be discerned, and care must be taken not to trample on the rights of those systematically excluded from the community. The court's reasoning helps little in this task. The court seems to assume that, because legal precedent has widely moved to accept a new duty, reasonable people have done the same. If the test of shared values is the wide recognition of a legal obligation, then no factual circumstance for which the existing precedents in other jurisdictions gave different answers could give rise to a duty, nor could Indiana ever be the first state, or even one of the first states, to recognize an unprecedented theory of liability. For instance, the court's resolution of the duty issue in *Burrell* was novel; courts in other jurisdictions have not typically retained the three categories of invitee, licensee, and trespasser, but moved social guest into the invitee category. See KEETON, *supra* note 41, at 62. If the test of duty under consensus values requires a consensus in the legal community, then *Burrell* was clearly wrong. On the other hand, if the test is whether society in general recognizes the obligation of due care toward social guests, the decision may well have been correct; most people recognize that their obligations of care toward friends invited onto their property are greater than the obligations of care toward door-to-door solicitors. Cf. *Burrell v. Meads*, 569 N.E.2d 637, 643 (Ind. 1991) (noting that limiting the duty of care toward social guests to the obligations owed a licensee "simply does not comport with modern social practices").

presents an intriguing alternative to the other three models of duty. Although its full implications lie beyond the scope of this Article, it remains a language which lawyers and judges can use when they find that appeal to the languages of relationship, due care, and public policy does not result in the correct adjustment of the parties' responsibilities.

Choosing the relevant language for duty will be particularly important for two questions left unanswered by *Cowe*. The first is whether a parent (as opposed to the child) can sue for the expenses of raising an unwanted child or for the special expenses and the emotional distress of raising an impaired child.⁷⁵ Should the courts choose the language of public policy, then the factors identified in the first holding of *Cowe* might well preclude damages under any of these theories. On the other hand, the languages of relationship, due care, and in some instances, community values, all suggest that a claim for some or all of these expenses is appropriate.

Second, *Cowe* leaves open the scope of the duty of other defendants toward unborn children.⁷⁶ It seems that the only logical distinction between the two holdings in *Cowe* (and between their appeals to different models of duty) is that the court will refuse to recognize a duty toward those not yet conceived at the time of the negligence—at least for those injuries inherently associated with the process of conception and birth—while it will recognize a duty toward existing fetuses harmed by negligence.⁷⁷ If true, the distinction would suggest that doctors and drivers would owe a duty toward existing fetuses to prevent harm.⁷⁸ Although that result is not at all objectionable, the distinction on which the result is based is ultimately unsatisfying. Consider a doctor who negligently prescribed medication that harmed an existing fetus and also caused genetic damage to the mother, with the result that her future children were also harmed. Under *Cowe's* logic, even though the conduct and the harm are the same, the doctor is liable to the first child, but not to the future children.

75. See *Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984).

76. Persons who perform abortions are likely to be protected as long as *Roe v. Wade*, 410 U.S. 113 (1973), survives because a tort suit would likely be preempted by the constitutional right recognized in *Roe*. Cf. *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1987) (product liability suit preempted when unique federal interest and state tort claim were in significant conflict).

77. The court's reliance on the notion of control to create a duty of reasonable diagnosis and care cannot serve as a valid ground for distinction of the two holdings. The defendant also had control over the mother when she was raped; if control is the touchstone of duty, the court should have upheld the wrongful life theory.

78. The duty would still require proof of proximate cause where some defendants might succeed in proving that the type of harm was unforeseeable.

As this hypothetical example shows, the appeal to different models as the determinant of duty can create considerable inequities among similarly situated claims and claimants. We saw the same result when *Burrell* and *Valinet* appealed to different models of duty. The extraordinary thing about *Cowe*, however, is that it explicitly uses different models to decide two duty issues presented within a single case. The result is all the more extraordinary when we remember that *Cowe* failed to appeal to the hybrid model which *Webb v. Jarvis*, a case involving similar issues, had declared a month before to be the sole framework for the resolution of all duty issues. The failure of Indiana courts to develop a single, coherent view of duty is manifest.

III. APPLYING THE MODELS

The remaining duty decisions of the Indiana courts reflect the same inconsistency of theoretical foundation as the cases already discussed. Some duty decisions were premised on notions of relationship and control, some on notions of due care, and some on notions of public policy. If there was a reason that different duties were captured by different models, it was not apparent from the decisions themselves. If duty analysis in Indiana is to become coherent, every line of duty doctrine will need to be re-examined.

In this section, I review the year's duty decisions for the three types of harm which invoke tort liability: harm to body or property, harm to human dignity or psychic peace, and harm to economic interests. For each line of duty decisions, I identify the primary language used by the court to decide the issue of duty. My purpose in doing so is not to suggest the specific revisions which a consistent theory would require for each area of duty; it is rather to describe the range of existing duties and to highlight the duties which need re-examination if a consistent theory of duty, whatever its content, is to be developed.

A. Physical Harms

1. *Medical Malpractice*.—The quintessential duty based on an existing relationship is medical malpractice. During the past year, the lack of a relationship of patient-doctor privity was fatal to two cases which sought to recover for alleged malpractice committed on a person other than the plaintiff, while the existence of a direct doctor-patient relationship between the defendant and the plaintiff led two other courts to read the duty of care generously. The two cases refusing to find a duty in the absence of a doctor-patient relationship were *Webb v. Jarvis*, whose effect on the duty analysis has already been considered, and *Smith v. Methodist Hospital of Indiana, Inc.*⁷⁹ In *Smith*, the plaintiffs allegedly

79. 569 N.E.2d 743 (Ind. Ct. App. 1991).

suffered emotional distress because of a hospital's failure to advise them that their son, whom the hospital was maintaining on life support equipment for possible organ donation, was already brain dead. In order to recover for emotional distress, the plaintiffs needed to demonstrate the existence of fraud. The court affirmed a dismissal of the case, holding that there was no fraud because the hospital "did not owe a duty to [plaintiffs] to advise them of [their son's] condition where that information was not related to a course of medical treatment."⁸⁰ Because of its close relationship to the issue of psychic harm, I defer a fuller discussion of *Smith* until later in the Article. At this point, however, it is important to note that the lack of a relationship regarding the matter for which recovery was sought was the key variable in the court's ultimate decision.

When the doctor-patient relationship did exist, however, the courts were willing to read the duty of care more generously. *Centman v. Cobb*⁸¹ declared the relevant standard of care for a physician in the first year of postgraduate work. Because the Medical Malpractice Act and its duty of care—that of a reasonably skilled practitioner in the same or similar locality—technically apply only to physicians holding unlimited licenses, the standard of care for first-year physicians practicing with temporary licenses was unclear before *Centman*. On review of a motion to determine a preliminary question of law for the Medical Review Panel, the court of appeals found that first-year physicians must be held to the same standard of care as doctors with unlimited licenses in the same or similar locality.⁸² As the court reasoned, the common-law duty it imposed was proper because the first-year physicians in the case had a relationship in which they treated patients; they were supervised by hospital staff, they were continuing their medical studies, they held themselves out to possess the reasonable and ordinary qualifications of a doctor with an unlimited license, and the absence of contract or representations specifying their first-year status led the plaintiff to rely on their possession of a licensed practitioner's skills and judgment.⁸³ This language of relationship, control, and reliance highlights the model of relationship on which medical malpractice is based.

Another generous reading of the physician's obligation occurred in the context of an informed consent case. In *Griffith v. Jones*,⁸⁴ a court of appeals again considered the appropriate standard for breach of the physician's duty to inform a patient. The defendant's position was that

80. *Id.* at 746.

81. 581 N.E.2d 1286 (Ind. Ct. App. 1991).

82. *Id.* at 1288.

83. *Id.* at 1288-89.

84. 577 N.E.2d 258 (Ind. Ct. App. 1991).

a doctor needed to advise only of those risks of which a prudent physician would inform the patient. The plaintiff's position was that the doctor needed to advise of those risks which would be material to a prudent patient. Finding prior Indiana precedent supportive of the plaintiff's position,⁸⁵ the court opted for the "prudent patient" standard. As the court indicated, this standard better protected the patient's right of self-determination⁸⁶ and placed Indiana in line with the general (although by no means uniform) trend toward a patient-oriented duty of informed consent. Once again, the decision is consistent with a model of relationship, in which doctor control and patient reliance are significant variables. Had the court relied on the model of due care, the defendant's position would have prevailed.

Unfortunately, *Griffith* failed to resolve crucial issues such as the standard of causation⁸⁷ and the nature of the exceptions to the "prudent patient" rule.⁸⁸ Another informed consent case, *Kerr v. Carlos*,⁸⁹ touched on the causal issue. In *Kerr*, a physician failed to inform the patient that his associate would perform surgery, and the associate failed to obtain consent. The court nonetheless affirmed the entry of summary

85. See, e.g., *Payne v. Marion Gen. Hosp.*, 549 N.E.2d 1043 (Ind. Ct. App. 1990).; *Revord v. Russell*, 401 N.E.2d 763 (Ind. Ct. App. 1980); *Joy v. Chau*, 377 N.E.2d 670 (Ind. Ct. App. 1978). But see *Ellis v. Smith*, 528 N.E.2d 826 (Ind. Ct. App. 1988) (suggesting need for expert testimony on informed consent issues).

86. *Griffith*, 577 N.E.2d at 263. One matter which *Griffith* did clarify was a procedural one: because informed consent turns on the patient's right to know rather than the physician's standard practice, the court precluded the Medical Review Panel from rendering an opinion about whether there had been a lack of informed consent. *Id.* at 264. Had the panel done so, of course, its opinion could have been submitted to the jury. IND. CODE §§ 16-9.5-9-7, -9 (1988). Cf. *Dickey v. Long*, 575 N.E.2d 339 (Ind. Ct. App. 1991) (admission into evidence of panel opinion on a lack of breach of standard of care permissible even when plaintiff claimed that the breach was obvious to laypersons).

87. A patient must, of course, prove that the information not supplied by the physician would have made a difference in the patient's decision. Various standards for proving this counter-factual hypothesis are possible: whether the information would make a difference to the reasonable person, *Canterbury v. Spence*, 464 F.2d 772, 790-91 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1973), whether it would have made a subjective difference to the plaintiff, *Scott v. Bradford*, 606 P.2d 554 (Okla. 1979), or whether it would have made a difference to a reasonable person with the plaintiff's characteristics and quirks, see KEETON, *supra* note 41, § 32, at 192. In order to recover damages, the plaintiff might also need to show that she was worse off after the procedure performed without consent than she would have been after a procedure performed with consent.

88. *Canterbury v. Spence*, 464 F.2d 772, 788-90 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1973), recognized two exceptions: (1) emergency procedures in which the patient cannot give consent and (2) procedures for which the physician must withhold information in order to protect the patient's well-being. This latter, therapeutic exception could swallow the rule of disclosure if read broadly enough, and its existence and scope will ultimately need to be addressed by the Indiana courts.

89. 582 N.E.2d 860 (Ind. Ct. App. 1991).

judgment because the patient failed to prove through expert opinion "a causal connection between the inadequate disclosure and the resulting damages."⁹⁰ Thus, when consent to a procedure has been given, *Kerr* requires the plaintiff to prove two separate causal issues: that the patient would have consented to the change of physicians (presumably a question not requiring expert testimony),⁹¹ and if not, that the outcome of the procedure was worse because of the change in physicians.⁹² Although *Kerr* can technically be reconciled with *Griffith*, this second causal question gives little deference to *Griffith's* right of patient self-determination or to the model of relationship on which informed consent is based. If self-determination truly underlies informed consent, then the plaintiff in *Kerr* should have been entitled to whatever damages ensued from a procedure violating his autonomy regardless of whether similar damages might have been occasioned by a procedure for which proper consent was obtained.⁹³ Nor would the issue of the associate's exercise of due care, which is implicit in the second question, even be relevant to the causal issue.

It was undoubtedly this concern for the preservation of plaintiff autonomy which moved the court in *Kerr* to observe that the patient would have had a valid claim for battery had he bothered to assert one.⁹⁴ It makes little sense to create, as *Kerr* apparently did, different elements of causal proof for informed consent and battery when the relevant conduct and the injury suffered is identical for both claims, when the relationship, control, and reliance are identical for both claims, and when the only claim against the physician who obtained the consent is likely to be lack of informed consent.⁹⁵ By relying on notions derived

90. *Id.* at 864.

91. *See supra* note 87 and accompanying text.

92. *Kerr*, 582 N.E.2d at 864-65.

93. *See Canterbury v. Spence*, 464 F.2d 772, 790 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1973). The "no harm, no foul" rule of the court of appeals fails to acknowledge that the harm flows from the lack of consent, rather than from the quality of the procedure performed.

94. *See Kerr v. Carlos*, 582 N.E.2d 860, 864 (Ind. Ct. App. 1991).

95. *See Perna v. Pirozzi*, 457 A.2d 431 (N.J. 1983) (holding that claim against physician who operated was battery, while claim against physician who obtained consent was malpractice, but failing to resolve ambiguity regarding the exact measure of damages against the latter physician). Curiously, *Kerr* cited *Perna* for its holding that the operating physician could be liable for battery, but failed to acknowledge *Perna's* holding that the claim against the referring doctor sounded in informed consent. *See Kerr*, 582 N.E.2d at 864. The holding in *Kerr* is also somewhat at odds with *Boruff v. Jesseph*, 576 N.E.2d 1297 (Ind. Ct. App. 1991). The facts in *Boruff* are nearly identical to those in *Kerr*, but the plaintiff there attempted to file a battery claim in order to bypass the Medical Review Panel. The court of appeals held that the performance of surgery by an associate whom

from the model of due care rather than from the model of relationship within which informed consent is better understood, *Kerr* ends up suffering from the schizophrenia already diagnosed in *Burrell*, *Valinet*, and *Cowe*.

2. *Liability Created by Injuries to or the Actions of Contractors.*—Injuries associated with the work of contractors resulted in numerous reported decisions. None of the decisions altered existing law, although several involved interesting new factual applications of the existing rules. Two cases clarified the scope of the contractor's own liability. *Lynn v. Hart*⁹⁶ reiterated the rule that a contractor is no longer liable for an injury after the work has been accepted by the owner and found that the exception to this rule—that the work is left in a condition defectively dangerous, inherently dangerous, or imminently dangerous—did not apply to a parking lot plowed by the contractor the day before the plaintiff slipped and fell.⁹⁷ *Alexander v. City of Shelbyville*⁹⁸ held that an engineering firm who contractually agreed to supervise the work of a construction contractor owed no duty to an employee of the contractor.⁹⁹ The engineering firm's right to inspect and control the performance of the construction contractor did not, without evidence of negligent inspection or actual control, create a duty of reasonable care.¹⁰⁰

Alexander was also one of two cases to discuss the duties of an employer of a contractor for injuries caused to others because of the negligence of the contractor. The *Alexander* court found that the employer of the construction contractor owed no duty under its contractual reservation of a right to inspect and control performance, but that the employer did owe a nondelegable duty of care imposed by statute to supervise and control sewage projects.¹⁰¹ This nondelegable duty gave rise to vicarious liability for the construction contractor's negligence.¹⁰² Similarly, *Christensen v. Sears, Roebuck & Co.*¹⁰³ found that the seller

the plaintiffs specifically did not wish to be involved arose out of the provision of health care services, and the claim of battery therefore needed to be submitted to the Medical Review Panel. *Id.* at 1299.

96. 565 N.E.2d 1162 (Ind. Ct. App. 1991).

97. Another application of the same rule can be found in *Hamilton v. Roger Sherman Architects Group, Inc.*, 565 N.E.2d 1136, 1139 (Ind. Ct. App. 1991), in which the court said that an owner's acceptance of a contractor's work ends a contractor's liability unless "the work is so negligently defective as to be imminently dangerous to third persons" or "when the plans relied on by the contractor are so obviously defective that no reasonable independent contractor would follow them." *Id.*

98. 575 N.E.2d 1058 (Ind. Ct. App. 1991).

99. *Id.* at 1061.

100. *Id.* at 1062.

101. *Id.* at 1061.

102. *Id.* at 1062.

103. 565 N.E.2d 1103 (Ind. Ct. App. 1991).

of a furnace could be vicariously liable for the installer's alleged negligence.¹⁰⁴ As the court stated, one exception to the rule of nonliability for the negligence of contractors is the employer's assumption of the contractor's duty.¹⁰⁵ The court then held that the seller's somewhat ambiguous sales contract created responsibility for the contractor's work.¹⁰⁶

Finally, two cases considered the liability of employers for injuries to their employees or contractors. *Whitebirch v. Stiller*¹⁰⁷ started from the proposition that an employer owes a duty to provide a reasonably safe workplace to an employee. *Whitebirch*, however, found an exception to that rule dispositive of the plaintiff's case: the employee could not recover for an unsafe condition which she created and maintained if that condition arose from the failure to discharge the responsibility for which she was employed.¹⁰⁸ On the other hand, *McClure v. Strother*¹⁰⁹ started from the opposite premise: that the employer of a contractor owes no duty to supply a safe workplace.¹¹⁰ The court also seized upon an exception to this rule: the employer can be liable when he or she assumes control of a dangerous instrumentality. Because the employer refused to permit the contractor to tie a ladder to the gutters, the court found that a reasonable jury could infer that the employer had assumed control over the ladder and reversed a summary judgment entered for the employer.¹¹¹

As these cases show, the exceptions to the rules of nonliability for the actions of contractors are often more significant than the rules themselves.¹¹² From the viewpoint of a model of due care, these finespun technicalities of rule and exception are senseless and unduly resistant to the modern notion of due care under the circumstances. Yet, from the viewpoint of a model of relationship, with its language of privity, control, and reliance, the cases actually make a great deal of sense. The lack of direct relationship between the parties, control by the defendant, or reliance by the plaintiff explains the decisions for the contractors in *Lynn* and *Alexander*. On the other hand, the statutory or contractual relationship between the parties explains the contrary decisions against the employer in *Alexander* and the retailer in *Christensen*. Likewise, the

104. *Id.* at 1109.

105. *Id.* at 1107.

106. *Id.* at 1108.

107. 580 N.E.2d 262 (Ind. Ct. App. 1991).

108. *Id.* at 264.

109. 570 N.E.2d 1319 (Ind. Ct. App. 1991).

110. The employer must, however, keep the property in reasonably safe condition. *Id.* at 1321.

111. *Id.* at 1323.

112. See RESTATEMENT (SECOND) OF TORTS § 409 cmt. b (1965); KEETON, *supra* note 41, § 71, at 510.

degree of the employer's control and of the plaintiff's legitimate reliance on the employer's conduct marks the difference between *Whitebirch* and *McClure*. Indeed, when relationship, control, and reliance are understood to be the critical variables in the duty analysis, the rules of contractor liability typically come out in the right way. Only the unsophisticated "general" rule that employers have no liability for the acts of contractors—a rule which is not grounded in the relevant language of relationship—is wrong.

3. *Liability for the Actions of Franchisees*.—One court of appeals considered the duty of a franchisor to an injured employee of a franchisee. In *Whitten v. Kentucky Fried Chicken Corp.*,¹¹³ the employee was severely burned while cleaning out a fryer. The fryer was purchased by the franchisee, apparently without any direction or control by the franchisor. A subsequent franchise agreement, however, obliged the franchisee to use equipment approved by the franchisor and to make modifications ordered by the franchisor to existing equipment. A subsequent agreement between the franchisor and the fryer manufacturer made the manufacturer an approved source of fryers. In addition, the franchise agreement gave the franchisor the right to inspect the restaurant to determine compliance with contract specifications.

The case presented a strong factual analogy to the employer's liability for the actions of its contractors, and it is not surprising that the court of appeals turned to that relationship to define the duty. It found two potential sources of duty: the employer's liability for negligence in the work over which it retains control and the Good Samaritan obligation of a person who undertakes to render services for another.¹¹⁴ Because there were factual issues concerning the extent of control over the selection of equipment and the scope of the franchisor's undertakings to select safe equipment and inspect the premises, the court reversed a summary judgment in favor of the franchisor.¹¹⁵ In this area of duty, the court's reliance on the model of relationship was manifest. The crucial words in the court's vocabulary were contractual relations, control, and undertaking for another. The language of due care, public policy, and community values was missing.

4. *Liability for Another's Criminal Conduct*.—The duty of reasonable care to prevent another's criminal conduct is a modern invention which has begun to supplant, in some instances, the no-duty rule of the common law.¹¹⁶ During the past year, the relevant decisions of the Indiana courts

113. 570 N.E.2d 1353 (Ind. Ct. App. 1991).

114. *Id.* at 1356.

115. *Id.* at 1359.

116. See, e.g., *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477

appeared to be somewhat inconsistent at the level of legal rule. Once we appreciate that Indiana's dominant model of liability for another's criminal conduct is that of relationship, and thus presents the same fundamental issues as liability for the acts of a contractor or franchisor, the apparent inconsistencies resolve themselves into a consistent pattern of decisions.

The leading case this year was *Webb v. Jarvis*, in which the Indiana Supreme Court held that a doctor who negligently prescribed steroids to a patient owed no duty to third persons criminally harmed by the patient.¹¹⁷ As already discussed, *Webb* developed a three-prong test for the existence of duty (relationship, foreseeability, and public policy).¹¹⁸ There is no doubt, however, that the critical factor for the court was the lack of a relationship on which the plaintiff relied.¹¹⁹ Although decided before *Webb*, two appellate court decisions provide excellent examples to test the centrality of relationship in *Webb's* analysis. In *Nalls v. Blank*,¹²⁰ a tenant was assaulted inside her apartment. The building was locked, but the assailant gained entry by breaking into a key retaining box which held the key used by the Postal Service to enter the building. The court of appeals held that the landlord was liable because he gratuitously assumed the duty of providing security measures.¹²¹

Based on an analysis of *Webb's* three factors, the existence of a duty in *Nalls* is problematic. The foreseeability of harm is certainly no greater in *Nalls* than in *Webb*, and public policy arguments as credible as the unsophisticated and one-sided arguments used in *Webb* can be concocted in favor of the landlord. Thus, the only factor which clearly distinguishes the two cases is the existence of a relationship in *Nalls* and the lack of a relationship in *Webb*. Indeed, had *Nalls* focused directly on the relationship rather than a dubious "gratuitous assumption," it could have made even shorter work of the duty question. A contractual relationship existed between the parties, the defendant had control over the security measures, and the defendant knew of the plaintiff's reliance on those measures. Relationship is thus the key feature which allows the imposition of a duty.

(D.C. Cir. 1970); *Tarasoff v. Regents of Univ. of Cal.*, 551 P. 2d 334 (Cal. 1976). Cf. RESTATEMENT (SECOND) OF TORTS § 315 (1965) (no duty to control conduct of another to prevent him from causing harm in the absence of a special relationship).

117. *Webb v. Jarvis*, 575 N.E.2d 992, 993 (Ind. 1991).

118. See *supra* note 27 and accompanying text.

119. The court's foreseeability analysis was weak, and its public policy analysis focused on far fewer than all of the potentially relevant policy factors.

120. 571 N.E.2d 1321 (Ind. Ct. App. 1991).

121. *Id.* at 1324.

The same lesson can be derived from *Foster v. Purdue University Chapter, The Beta Mu of Beta Theta Pi*.¹²² In *Foster*, a freshman fraternity member was rendered a quadriplegic when he apparently got drunk at a fraternity party and fell off a makeshift slide. The freshman, who was not of legal drinking age, sued the liquor store which had supplied the alcohol, the fraternity's house association, and the national fraternity. Using the language of relationship and control, the court dismissed the claims against all three defendants. The liquor store had policies which ensured the sale of alcohol only to students of legal age and "had no right to control [plaintiff's] consumption of alcohol."¹²³ The national fraternity had a policy against underage drinking, but had no power to implement its policy and had never undertaken to enforce a ban on underage drinking in the fraternity. The house association had the power to prescribe rules to prevent underage drinking, but never exercised any actual control over the fraternity. Moreover, there appeared to be a lack of reliance by the plaintiff on any actions or policies of the defendants, and there was a lack of knowledge by the defendants that the plaintiff would rely on their actions and policies. In the absence of evidence of control or reliance, therefore, none of the defendants were held to have a duty to prevent the illegal provision of alcohol to a minor.¹²⁴

Although the factor of relationship strongly favors a lack of duty, the issue is much closer when *Webb's* other factors (foreseeability and public policy) are blended in. As *Webb* itself recognized, the foreseeable dangers of allowing the supply of excessive liquor are well established.¹²⁵ Similarly, unlike the health care policy issues which counseled against a duty in *Webb*, the public interest in the protection of the relationship between a fraternity house and its liquor store and its controlling organizations and in the protection of the free flow of alcohol to minors are obviously weak public policy reasons on which to stake a lack of duty.

If *Foster* is correct, then it ultimately must be because of the lack of control and the lack of plaintiff reliance—in other words, the lack of relationship. It is hardly surprising, therefore, that the language of relationship and control permeates the opinion. That approach stands in stark contrast to the approach of *Valinet v. Eskew* and *Cowe v. Forum Group*, whose respective languages of due care and public policy would certainly have led to the imposition of a duty in *Foster*. The

122. 567 N.E.2d 865 (Ind. Ct. App. 1991).

123. *Id.* at 869.

124. *Id.*

125. See *Webb v. Jarvis*, 575 N.E.2d 992, 997 (Ind. 1991).

critical choice in *Foster*, as in all duty cases, was the selection of the proper model for analysis. The court of appeals chose the model of relationship. The rest was a matter of technique.

5. *The Duty of a Supplier of Chattels*.—Viewed as a failure to prevent the criminal conduct of another, the decision in *Foster* not to hold the liquor store liable makes sense: without control there is no relationship and without relationship there is no duty. Viewed as a negligent supply of a chattel, however, the court was clearly wrong. A supplier's right to control of the use of a chattel is not an element of a claim for negligent supply. Rather, the critical issues are whether the supplier warned the user of those dangers of which the user was not aware, whether the alcohol was used by a person ignorant of its unreasonably unsafe nature, and whether the supplier knew or had reason to know that alcohol would be supplied to persons who, because of their youth and incompetence, would be endangered by its use. The reason for the different focus is simple. Unlike the duty to prevent criminal conduct, the duty of a supplier is based on a model of due care under the circumstances.¹²⁶

Three cases decided during the year demonstrate the reliance of the supplier's duty on the model of due care. In *Cox v. American Aggregates Corp.*,¹²⁷ summary judgment for the seller of a respirator was reversed because there was evidence that the seller recommended the respirator to the plaintiff's employer with the knowledge that it would not filter out the types of fumes to which the plaintiff was exposed.¹²⁸ Even though there was a lack of control over the use of the respirator, the court found that the recommendation implied a duty of reasonable care in the sale of the product.¹²⁹ In *Billingsley v. Brown*,¹³⁰ the court found that a defendant who supplied his neighbor with a power saw owed no duty when the plaintiff realized that the saw was old and the defendant had warned him that the saw occasionally jammed.¹³¹ In *Johnson v. Patterson*,¹³² a court of appeals recognized for the first time the tort of negligent entrustment of a firearm to an incompetent person, but found that the duty elements (entrustment to an incapacitated person or one who cannot use the chattel with reasonable care with actual and specific knowledge of the incapacity) were not established on the peculiar facts of the case.¹³³

126. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

127. 580 N.E.2d 679 (Ind. Ct. App. 1991).

128. *Id.* at 685-86.

129. *Id.* at 686.

130. 569 N.E.2d 687 (Ind. Ct. App. 1991).

131. *Id.* at 688.

132. 570 N.E.2d 93 (Ind. Ct. App. 1991).

133. *Id.* at 96-97.

The duty of care in each of these cases does not hinge on relationship, control, or reliance; it hinges on a defendant's superior knowledge of possible harm.¹³⁴ This language of foreseeability is simply not consistent with the language of relationship which defines the duties in the areas of malpractice, contractors' liability, and prevention of criminal conduct. Claims against liquor stores and gun suppliers are easily resolved against the plaintiff when the relevant issue is whether there is relationship and control sufficient to prevent criminal conduct, but they are far more problematic to resolve when the issue is whether the defendant had knowledge of possible harm or incompetence. As long as Indiana courts speak both languages, the courts' choice of language, and not the reasonableness of the defendant's conduct, will define the legal obligations owed.

6. *Products Liability*.—Products liability is a special application of the general duty of the suppliers of chattels. After the significant developments in Indiana products liability during 1990,¹³⁵ 1991 had few notable cases. In one case, the obligations of Indiana's Product Liability Act were extended to defendants who become so sufficiently involved in the reconditioning of a product that they were no longer performing a service but were instead selling a product.¹³⁶ In another case, an instruction sheet was not found to be a "product" within the meaning of the Product Liability Act.¹³⁷ Furthermore, the design of a car with

134. In both *Cox* and *Billingsley*, the element of plaintiff reliance could have served as a critical feature in the creation of duty; the plaintiff in *Cox* had relied on the advice of the defendants, while the defendant's warnings in *Billingsley* made reliance on the safety of the chattel unjust. In neither case, however, did the courts specifically inquire into the existence of reliance or knowledge of reliance, as had *Webb*. In any event, the issue of reliance was entirely irrelevant to the negligent entrustment decision in *Johnson*.

135. See generally John Vargo, *Strict Liability for Products: An Achievable Goal*, 24 IND. L. REV. 1197 (1991).

136. *Lilge v. Russell's Trailer Repair, Inc.*, 565 N.E.2d 1146 (Ind. Ct. App. 1991).

137. *Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215 (10th Cir. 1991). The exact circumstance of the holding was that, in 1979, an airplane manufacturer issued an instruction sheet for a plane which was initially sold in 1967. The ten-year statute of repose barred a claim brought in 1986 for negligent design of the airplane. The plaintiff tried to resurrect the case by contending that the instruction sheet was itself a product which failed to warn of the defect in the plane.

air bags was held to be preempted by federal law.¹³⁸

The more important opinions centered on aspects of the seller's duty of care. The view that Indiana's "state of the art" defense¹³⁹ requires proof of a product's conformity to the existing technological capabilities for the product garnered additional support.¹⁴⁰ The terms "defective condition" and "unreasonably dangerous," which are the bedrock elements necessary to demonstrate a strict products liability claim,¹⁴¹ received a restrictive interpretation in three cases. In *Hamilton v. Roger Sherman Architects Group, Inc.*,¹⁴² a waitress, who banged her head on a bar she was forced to stoop under in order to fill drink orders, sued the architect and construction contractor on theories of design defect and negligence. Avoiding the interesting issues of whether the bar was a "product" and the defendants "sellers" of a product,¹⁴³ the court found that this "stationary wooden object" was not "defective" because it posed no risk of harm "not contemplated by reasonable persons among the bar's expected users,"¹⁴⁴ nor was the bar unreasonably dangerous because its risk of harm was not "beyond the risk of harm contemplated by the 'ordinary consumer' of the bar."¹⁴⁵ *Cox v. American Aggregates Corp.* held that a respirator not intended or designed to filter out the fumes to which the plaintiff was exposed could not be defective.¹⁴⁶ The court frankly seemed to ignore the fact that a product is defective when it fails to meet the consumer's expectations, not the manufacturer's intentions. Finally, *Condon v. Carl J. Reinke & Sons, Inc.*¹⁴⁷ found that a reinforcing bar did not pose an unreasonably dangerous risk when the plaintiff's testimony revealed only that the need to rebend the bars was a common problem at construction sites.¹⁴⁸

In theory, of course, products liability is concerned with the hazards of the product, not the conduct of the manufacturer. Yet, liability is

138. *Heath v. General Motors Corp.*, 756 F. Supp. 1144 (S.D. Ind. 1991).

139. IND. CODE § 33-1-1.5-4(b)(4) (1988).

140. *Phillips v. Cameron Tool Corp.*, 950 F.2d 488 (7th Cir. 1991); *Weller v. Mack Trucks*, 570 N.E.2d 1341 (Ind. Ct. App. 1991). This interpretation of Indiana's "state of the art" defense was first espoused in *Montgomery Ward & Co. v. Gregg*, 554 N.E.2d 1145 (Ind. Ct. App. 1990).

141. See IND. CODE §§ 33-1-1.5-2, -2.5(a) (1988).

142. 565 N.E.2d 1136 (Ind. Ct. App. 1991).

143. *Id.* at 1137 n.2. See IND. CODE § 33-1-1.5-2.5(a) (1988) (limiting strict product liability to sellers of products).

144. *Hamilton*, 565 N.E.2d at 1138.

145. *Id.* Negligence claims against the architect and the contractor were also dismissed. *Id.* at 1138-39.

146. *Cox v. American Aggregates Corp.*, 580 N.E.2d 679, 685 (Ind. Ct. App. 1991).

147. 575 N.E.2d 17 (Ind. Ct. App. 1991).

148. *Id.* at 19.

far from strict and ultimately turns on the care exercised by the manufacturer to avoid unreasonable risks through the use of the best available technology. The model of due care, albeit somewhat modified around the edges, lies at the heart of the products liability scheme in Indiana.

B. Psychic Harms

With the exception of claims for wrongful life and negligent harm to the fetus, the past year's duty decisions in the area of physical harm invariably revolved around either the model of relationship or the model of due care. 1991 was also a year of truly significant movement in the area of recovery for psychic harms. Until this year, Indiana's rules on psychic harm remained mired in the first half of this century: recovery for intentional infliction of emotional distress was not recognized unless accompanied by another intentional tort, and negligent infliction of emotional distress was only recognized when it resulted from a direct physical impact.¹⁴⁹

In four cases which are perhaps destined to become the most far-reaching tort decisions in many years, the courts pushed the law toward greater recognition of psychic harms. The recognition was grudging and somewhat illogical. The reason is that the courts overthrew the model of public policy which had refused to recognize naked emotional distress claims, but they did not rest the new duties on the models of relationship or due care. As a result, the decisions in the area of psychic injury were both confusing in their ultimate import and subject to the charge of arbitrary, ipse dixit line drawing.

The four decisions were *Cullison v. Medley*,¹⁵⁰ *Shuamber v. Henderson*,¹⁵¹ *Smith v. Methodist Hospital of Indiana, Inc.*,¹⁵² and *Eakin v. Kumiega*.¹⁵³ *Cullison* involved a plaintiff who had invited a teenage girl to his house trailer for a soda one afternoon. Late that evening, he heard a banging at his door, and invited a girl outside into the trailer. When he returned to the living room after putting on some

149. For a description of the law existing in Indiana prior to 1991, see *New York, Chicago & St. Louis R.R. Co. v. Henderson*, 146 N.E.2d 531 (Ind. 1957); *Naughle v. Feeney-Hornak Shadeland Mortuary, Inc.*, 498 N.E.2d 1298 (Ind. Ct. App. 1986). Elsewhere, the tort of intentional infliction of emotional distress has been widely recognized, and recovery for negligent infliction of emotional distress is not typically dependent on a physical impact. See, e.g., *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813 (Cal. 1980); *George v. Jordan Marsh Co.*, 268 N.E.2d 915 (Mass. 1971); *Rockhill v. Pollard*, 485 P.2d 28 (Or. 1971).

150. 570 N.E.2d 27 (Ind. 1991).

151. 579 N.E.2d 452 (Ind. 1991).

152. 569 N.E.2d 743 (Ind. Ct. App. 1991).

153. 567 N.E.2d 150 (Ind. Ct. App. 1991).

clothes, he found the teenager, her father, her mother, and her brother-in-law sitting in the dark. The father had a gun strapped to his thigh, and the mother had her hand held in her coat pocket as though she had a gun as well. The father kept clutching his gun and shaking it while the girl and her mother berated the plaintiff and called him a "pervert."¹⁵⁴ At one point the father said that he would "jump astraddle" the plaintiff if he did not leave his daughter alone.¹⁵⁵ Although no one ever touched him, the plaintiff said he was constantly afraid that he would be shot. His fear continued over the course of the next several weeks, when he saw the teenager and her mother walk past his trailer "in a taunting manner"¹⁵⁶ and when he saw the father, still wearing a gun, glare at him in a restaurant and even, on one occasion, stand over him with the gun approximately one foot from his face.

Because of the lack of physical impact, the court of appeals affirmed summary judgment for the defendants. The supreme court took a different view. The court began by noting that the plaintiff had alleged four causes of action: trespass, assault, invasion of privacy, and intentional infliction of emotional distress.¹⁵⁷ The court admitted that, in the absence of physical impact, the occurrence of a trespass had not previously given rise in Indiana to a claim for emotional distress.¹⁵⁸ The reasons which supported this rule were based in policy: "mental anguish is speculative, subject to exaggeration, likely to lead to fictitious claims, and often so unforeseeable that there is no rational basis for awarding damages."¹⁵⁹

Rejecting these policy arguments in favor of an appeal to the model of due care, the court found that the impact rule, "whatever its historical foundation, is no longer valid and . . . does not apply to prohibit recovery for emotional distress when sustained in the course of a tortious trespass."¹⁶⁰ The court reasoned that the intentional invasion of another's property can "provoke a reasonably foreseeable emotional disturbance or trauma."¹⁶¹ Starting from this language of foreseeability and due care, the court then refuted each of the policy arguments supporting the impact rule. The fact of physical impact "does not make mental injuries any less speculative, subject to exaggeration, or likely to lead

154. *Cullison*, 570 N.E.2d at 28.

155. *Id.* at 29.

156. *Id.* at 31.

157. *Id.* at 28.

158. *Id.* at 29.

159. *Id.*

160. *Id.* at 30.

161. *Id.*

to fictitious claims.”¹⁶² Nor is the inundation of the court system a valid ground to deny legitimate claims.¹⁶³

Nevertheless, the court's disposition of the invasion of privacy and intentional infliction of emotional distress claims demonstrated that the court was unwilling to extend this model of due care too far. Although the supreme court stated that the uninvited intrusion of the defendants into his home constituted an “invasion of Cullison's right of privacy,”¹⁶⁴ it held that the plaintiff could not simultaneously maintain an action for invasion of privacy and trespass.¹⁶⁵ With respect to the defendants' conduct in walking past his home and in the restaurant, the court held that the “plaintiff had no legal right to be left alone on a public street or in a public place.”¹⁶⁶

Similarly, the court refused to allow the claim for intentional infliction of emotional distress.¹⁶⁷ The court began by noting that the theory of intentional infliction of emotional distress was not previously recognized in Indiana. Then, without any discussion beyond a quotation of the Restatement section which describes the tort in intentional infliction,¹⁶⁸ the court changed the law. “We hold,” the court said, “that under proper circumstances, liability will attach to a defendant for an intentional infliction of emotional distress.”¹⁶⁹

Like its invasion of privacy decision, however, the court withdrew the broad promise of its holding by finding that “the facts of this case do not support a finding that the Medleys intended to cause emotional distress to Cullison.”¹⁷⁰ This narrowing is subject to one of two interpretations. First, because it would be difficult to conceive of a set of facts more extreme than those presented in the case, the court may have been effectively preventing any real change in the law of intentional infliction of emotional distress by allowing the theory but never finding a set of facts egregious enough to meet that theory. Second, the court may have been saying that the most egregious conduct was adequately

162. *Id.*

163. *Id.*

164. *Id.* at 31.

165. *Id.*

166. *Id.* The court seemed to ignore that the plaintiff was in his home when the teenager and her mother walked by. If the court intended to suggest that an invasion of privacy can occur only when there has been a physical invasion of the plaintiff's property, then the tort of intrusion on seclusion is a useless appendage on the doctrine of trespass. It remains to be seen whether intrusion on seclusion will be given a broader reading in future cases.

167. *Id.*

168. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 46 (1965)).

169. *Id.*

170. *Id.*

redressed by the claims for trespass and assault,¹⁷¹ and the only conduct which fell outside of the trespass and assault claims was not egregious enough to establish an intentional infliction of emotional distress. Therefore, like the invasion of privacy claim, the court may have been saying only that there was no need for another theory which compensated for the same injury.

This latter interpretation, which has some support in the opinion¹⁷² and is certainly a more reasonable reading of the case, suffers from a serious flaw: it forces a plaintiff to elect a theory of recovery before completion of discovery and trial. As the court itself admitted, the plaintiff's trespass and assault claims could fail before a jury. Without his intentional infliction of emotional distress claim, the plaintiff would then be unable to recover for the emotional distress inflicted in his home. Conversely, if the plaintiff elected to proceed only on the emotional distress theory, it would be possible for the defendants to demonstrate that an assault occurred and thus avoid liability under the plaintiff's theory. This sharp practice, which smacks of the rigors of the common-law writs long since abandoned in favor of liberal pleading, will need to be corrected if the new theory of intentional infliction of emotional distress is to be meaningful.

The more general point, however, is that *Cullison* abandoned a duty rule grounded in policy through an appeal to the language of foreseeability and due care. The court's unwillingness to allow the theories of invasion of privacy and intentional infliction of emotional distress to be pleaded in conjunction with trespass and assault indicates that, for the time being at least, public policy concerns about the scope of this new liability lurk beneath the surface.

The same conclusion applies to the Indiana Supreme Court's decision in *Shuamber*, which concerned negligent (rather than intentional) infliction of emotional distress. In *Shuamber*, the defendant negligently collided with a car occupied by a mother and her two children. The son was killed. Both the mother and sister sued the defendant only for the emotional distress they suffered as a result of watching a member of their family die; they made no claim for the emotional trauma caused by their own injuries.

The court began by finding that, under then-existing Indiana precedent, the Shuambers had no claim for the simple reason that their emotional distress was not a direct consequence of the physical injuries

171. The court found that the facts of the case could support a claim for assault. *Id.* at 30-31.

172. There is some textual support for this interpretation. In finding a lack of intent to inflict emotional harm, the only actions the court specifically discussed were the mother's walks past the plaintiff's home and the encounters in the restaurant. *Id.* at 31.

which they themselves sustained.¹⁷³ The court noted that three policy considerations—flood of litigation, concern for fraudulent claims, and difficulty in proving a causal connection between conduct and distress—supported the no-duty rule.¹⁷⁴ Quoting from the paragraph in *Cullison* which refuted nearly identical policy arguments,¹⁷⁵ the court found that recovery for emotional distress could extend to instances in which the emotional distress occurred because of a physical injury negligently inflicted on a third person.¹⁷⁶

Like all courts which have recognized this claim of emotional distress by bystanders,¹⁷⁷ the court was then faced with putting certain limitations on bystander recovery. Other courts have chosen one of three lines: recovery only when the bystander suffers a physical impact from the negligence, recovery when the bystander is in the “zone of danger,” or recovery when there is a physical, temporal, and relational proximity between the bystander and the injured person.¹⁷⁸ Only four courts hued to the physical impact line;¹⁷⁹ the remainder were split between the more liberal theories of recovery. Noting that the facts of the case did not require it to go further, *Shuamber* cast its lot, at least for the time, with the four other courts drawing the most conservative line: the physical impact rule.¹⁸⁰

Two aspects of *Shuamber* stand out. The first is the difficult evidentiary burden which the court puts on the plaintiff. According to the court, the plaintiffs will be unable to recover for the general emotional distress they suffered from the loss of a family member; they can be compensated only for the extra emotional distress they suffered from being involved in the collision and witnessing the death.¹⁸¹

The second significant aspect of *Shuamber* is its lack of principled justification for the “physical impact” line it ultimately chooses. The line is certainly not supported by the model of due care. In fact, *Shuamber*’s quotation of *Cullison* conspicuously deletes the crucial sentence in which the *Cullison* court pinned its duty on the foreseeable

173. *Shuamber v. Henderson*, 579 N.E.2d 452, 455 (Ind. 1991).

174. *Id.*

175. *Id.*

176. *Id.*

177. According to *Shuamber*, Indiana was only one of three states which had not yet allowed for bystander emotional distress in some circumstances. The others were Arkansas and Kansas. *Id.* at 455 n.1.

178. See KEETON, *supra* note 41, § 54.

179. According to *Shuamber*, the four jurisdictions were the District of Columbia, Georgia, Kentucky, and Oregon. *Shuamber v. Henderson*, 579 N.E.2d 452, 455 n.1 (Ind. 1991).

180. *Id.* at 456.

181. *Id.*

emotional harm which a trespass might engender. Nor does the model of relationship explain the line of physical impact. The line can be justified, if at all, only through a model of community values, which seems unlikely,¹⁸² or through a model of public policy, whose policy arguments for limited recovery of emotional distress were thoroughly discredited both in *Cullison* and in the earlier portions of *Shuamber*.

Thus, *Shuamber* remains a rule in search of a reason. Indeed, it appears that the court has itself sown the seeds of the physical impact rule's destruction. *Shuamber*'s precise holding is that when a plaintiff "sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature *and of a kind and extent normally expected to occur in a reasonable person* . . . a plaintiff is entitled to maintain an action to recover for that emotional trauma."¹⁸³

At the core of the holding is the language of foreseeability and due care. That language, taken to its logical conclusion, rejects the physical impact rule. Therefore, when the court returns to the issue in a case not involving physical impact, as eventually it must, it will need to decide whether to pay attention to this model of due care and allow recovery for foreseeable emotional distress or return to a model of public policy and provide a reasoned explanation for the seemingly arbitrary requirement of physical impact.

The same tension between due care and public policy informs *Smith* and *Eakin*. In *Smith*, the plaintiffs' son was involved in a serious accident and was known by the hospital to be brain dead at some point during the day. Apparently because they were interested in using the son's organs for transplant, the hospital maintained the son on life support equipment. The hospital's physicians and chaplain never told the parents about the test results, but allowed the parents to spend time with the son before they finally made a decision to take him off the life support equipment without allowing any organ harvesting.

After they discovered that their son was brain dead all day, the parents sued the hospital for the emotional distress they suffered. Consistent with *Cullison*, the court of appeals noted that, in the absence of an intentional tort which acts as a "host," emotional distress can

182. Whatever the community's values concerning the allowance of an emotional distress claim for a mother who sees her child die, it is unlikely that the community would choose the physical impact as the place to draw the line. Moreover, the model of community values, as interpreted in *Cowe*, relies heavily on the legal consensus in other jurisdictions. The fact that 43 of the 50 jurisdictions in the United States have drawn a more generous line than *Shuamber* puts the case out of touch with the legal trend.

183. *Shuamber*, 579 N.E.2d at 456 (emphasis added).

be recovered only as a result of a physical impact.¹⁸⁴ Because there was no impact on the parents, the court turned to the plaintiffs' argument that the hospital committed the intentional tort of fraud in failing to disclose their son's condition. Assuming that fraud could serve as such a host, the court of appeals held that doctors have no duty to disclose matters concerning a patient's condition which are not relevant to that patient's course of treatment; hence, there was no fraud and no way to overcome the physical impact requirement for recovery of emotional distress.¹⁸⁵

Eakin presented the horrifying situation of two parents and a daughter who watched another daughter die in a hospital bed. While the daughter was recuperating from surgery, one of her arteries ruptured, and the projectile bleeding splashed onto the mother's clothes. Accepting the premise, later confirmed in *Shuamber*, that a physical impact could sustain a claim for negligent infliction of emotional distress, the court was faced with the issue of whether the blood splashed onto the mother's clothes satisfied the physical impact requirement. Retreating to the policies which underlay the impact rule—the fear of fictitious claims, speculativeness, and exaggeration—the court found that a physical injury, not mere physical impact, was required.¹⁸⁶

It is not at all clear that *Eakin* survives *Shuamber*, which held that emotional distress could be recovered following a "physical impact"¹⁸⁷ and which refuted the policy arguments on which *Eakin* relied.¹⁸⁸ Whether it does or not, however, the case demonstrates the inherently arbitrary decisions the physical impact rule requires. The plaintiff's emotional distress from witnessing her daughter's death would be no different if the splattering blood had caused some minor injury to the mother's eye or if it had missed the mother altogether. The case also demonstrates that the model of public policy lurks just beneath the surface of emotional distress, ready to derail any effort to orient the theory of emotional distress along the model of due care.

Thus, *Cullison* and *Shuamber* point generally toward the emergence of the model of due care in an area long held captive by the model of public policy. *Smith* and *Eakin* suggest a contrary trend. The rules themselves are not entirely consistent with any model. It remains to be seen whether due care will ultimately triumph or whether compensation

184. *Smith v. Methodist Hosp. of Ind., Inc.*, 569 N.E.2d 743, 745 (Ind. Ct. App. 1991).

185. *Id.* at 746.

186. *Eakin v. Kumiega*, 567 N.E.2d 150, 152-53 (Ind. Ct. App. 1991).

187. *Shuamber v. Henderson*, 579 N.E.2d 452, 456 (Ind. 1991).

188. *Id.* at 455.

for foreseeable emotional injury will be recaptured by the concerns of public policy.

C. *Economic Harms*

The final type of harms for which tort plaintiffs can recover are economic harms. The story of economic harms mirrors that of physical and psychic harms: a general trend to expand the categories of conduct subject to liability when they cause economic loss, with a significant minority of cases which counter the trend. Unlike the prior types of harm, however, the dominant model of liability is relationship. Only in limited circumstances do the models of due care, public policy, and community values play a role in the definition of the scope of liability for economic harm.

1. *Fraud and Constructive Fraud*.—Indiana's doctrine of fraud turns on the model of relationship. The duty to speak truthfully arises during the course of certain (but not all) business and trust relationships; the lack of reliance effectively defeats the duty. In the past year, the central issue in cases of actual fraud was liability for misrepresentations which could have arguably been statements of fact, which are actionable in Indiana, and statements of law, opinion, or future conduct, which are not. *Nestor v. Kapetanovic*¹⁸⁹ held that a step-father's promise to leave the entire estate to a daughter in return for the step-daughter's forbearance in asserting a claim against the assets of the intestate mother was a future promise for which no liability in fraud attached.¹⁹⁰ On the other hand, *Scott v. Bodor, Inc.*,¹⁹¹ found that fraudulent statements regarding the tax deductibility of a pension plan were actionable because the nature of the misrepresentations may have precluded the plaintiffs from discovering the law regarding tax deductibility.¹⁹² The defendants' professed expertise in tax law, which induced the plaintiffs to rely on their opinions, constituted an exception to the usual rule denying recovery for misstatements of law. Similarly, over a dissent that the defendants' representations were mere opinion and "trade talk," *Warren v. Wheeler*¹⁹³ held that a jury properly found fraud by a vendor of a human resources computer network which contained fewer clients than the vendor represented and which was rigged to prevent the participants from realizing the limited nature of the network.¹⁹⁴ On a side issue of increasing

189. 573 N.E.2d 457 (Ind. Ct. App. 1991).

190. *Id.* at 458.

191. 571 N.E.2d 313 (Ind. Ct. App. 1991).

192. *Id.* at 320.

193. 566 N.E.2d 1096 (Ind. Ct. App. 1991).

194. *Id.* at 1101.

importance in a technological age, the court held that the rigging of the network in a manner which concealed the network's limited membership constituted fraud, even though the defendant "never lied to [plaintiff's] face."¹⁹⁵

On the other hand, constructive fraud, which arises from a defendant's breach of a moral or equitable duty not to deceive, to violate a public or private confidence, or to injure the public interest, uses the models of community values, relationship, and public policy. A relationship is not essential to a finding of constructive fraud; the key inquiry is whether the failure to recognize a duty will result in an injustice.¹⁹⁶ At the same time, the claim of constructive fraud almost always arises in the context of pre-existing relationships of control and reliance. For instance, *Swain v. Swain*¹⁹⁷ found that an ex-husband who induced his ex-wife to refinance her mortgage at a time when they were attempting to reconcile with the promise that he would pay off the mortgage was found to have breached his duty when he stopped making the monthly payments.¹⁹⁸

The same pre-existing relationship and reliance existed in *Sanders v. Townsend*,¹⁹⁹ the constructive fraud case with the most far-reaching impact. In *Sanders*, the plaintiff alleged that her attorney coerced her into accepting an inadequate settlement for a personal injury suit. She presented two causes of action: negligence and constructive fraud. The court of appeals affirmed a summary judgment on the negligence claim, but found unresolved factual issues on the constructive fraud claim. After summarily affirming the appellate court's decision on the negligence issue,²⁰⁰ the Indiana Supreme Court turned to the central issue in the case: "whether a lawyer's alleged breach of a fiduciary duty to a client gives rise to a claim for constructive fraud."²⁰¹

The court said no. It began its analysis by noting that, unlike an actual fraud, a constructive fraud does not require an intent to deceive;

195. *Id.* at 1102.

196. *Scott v. Bodor*, 571 N.E.2d 313, 324 (Ind. Ct. App. 1991); *Swain v. Swain*, 576 N.E.2d 1281, 1284 (Ind. Ct. App. 1991).

197. 576 N.E.2d 1281 (Ind. Ct. App. 1991).

198. *Id.* at 1284.

199. 582 N.E.2d 355 (Ind. 1991).

200. The court of appeals found that, although there were questions of fact concerning the attorney's breach of duty, the plaintiff had failed to establish damages, i.e., that she would have received more money had she continued to press her case. The court rejected the personal opinions of the plaintiff and her husband on the value of her damages and found evidentiary difficulties with the use of the jury verdict reports prepared by her attorney. Thus, the plaintiff had no competent evidence to rebut the defendant's affidavit that the settlement was reasonable. *Sanders v. Townsend*, 509 N.E.2d 860, 863-64 (Ind. Ct. App. 1987).

201. *Sanders*, 582 N.E.2d at 357.

rather, it is inferred "from the relationship of the parties and the circumstances which surround them."²⁰² It then noted that the breach of a legal or equitable duty in a fiduciary relationship can amount to a constructive fraud.²⁰³ It also acknowledged that the relationship between attorney and client is "indisputabl[y] . . . of a confidential and fiduciary nature."²⁰⁴

The court then refused to complete the syllogism. The reason, the court said, is that "[u]nlike most other fiduciary obligations, the relationship between attorney and client, as well as the professional and private conduct of attorneys, is subject to several forms of 'policing.'"²⁰⁵ Among those forms are a malpractice action, an action for actual fraud, the Rules of Professional Responsibility, the sanctions of the supreme court for breaches of these Rules, and the requirement of legal education, bar examinations, and continuing legal education.²⁰⁶ In *Sanders*, there was no malpractice or fraud,²⁰⁷ and the court specifically rejected the proposition that the Rules of Professional Conduct create standards for civil liability because use of the Rules "would create unreasonable, unwarranted, and cumulative exposure to liability."²⁰⁸

Clearly, *Sanders* does not foreclose all legal actions against attorneys. Nor does it allow an attorney to breach a Rule of Professional Conduct without fear of legal consequence; after all, a Rule can define the applicable standard of care in a malpractice or fraud claim.²⁰⁹ Yet, it significantly confines a plaintiff by restricting her to these theories. The way it does so is also instructive. Simply put, *Sanders* abandons the models of relationship and community values which undergird constructive fraud in favor of the models of due care and public policy. First, it appeals to the model of due care to argue that an action for malpractice acts as a check on attorney overreaching. It then appeals to other deterrent mechanisms on attorneys, making the public policy judgment that too much regulation of the attorney-client relationship is counter-productive and unnecessary.

The extent to which *Sanders* signals a shift in other factual situations which might give rise to a claim of constructive fraud remains to be

202. *Id.* at 358.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 359. The court was careful to note that its opinion does not foreclose the possibility of a disciplinary action against an attorney who breaches a fiduciary obligation. *Id.*

209. *Id.*

seen. The court's language suggests that the opinion should be read narrowly and should extend only to other relationships with similar external mechanisms to deter overreaching.²¹⁰ Constructive fraud is now a battleground on which relationship is competing with public policy for dominance.

2. *Legal Malpractice*.—Aside from *Sanders*, there were two significant decisions affecting the lawyer's duty toward the client. In *Driver v. Howard County*,²¹¹ a deputy public defender transferred a case to a colleague without informing the defendant of the transfer or of the trial date. Because the deputy public defender had no reason to believe that the colleague was incompetent and the defendant had knowledge of the transfer and the trial date sufficiently far in advance of trial that he was able to retain his own counsel, the court found no malpractice.²¹² On an issue of greater significance, the court also found that the chief public defender could not be liable for malpractice on the theory of a failure to supervise the two deputy public defenders who represented the plaintiff. Because each deputy had a duty to exercise professional judgment, the chief defender had "no right to interject himself into the attorney client relationship by controlling [their] decision."²¹³ The application of this holding to law office and other supervisory settings is evident.²¹⁴

Another malpractice case, *Hacker v. Holland*,²¹⁵ was the only bright spot for plaintiffs claiming legal malpractice. When a buyer's note became uncollectible, a seller of real estate sued the attorney who prepared the closing. At trial, the defendant called a former judge who testified that the seller could not, as a matter of law, sue the attorney until she had sued the buyer on the valid contract. The court reversed a judgment entered for the attorney, holding that experts cannot testify about conclusions or interpretations of law.²¹⁶ It also clarified the proof the plaintiff would need on retrial to show that she had an attorney-client relationship with the defendant, who was the buyer's lawyer. According to the court, she needed to demonstrate either an agreement to act on her behalf or a prior, continuous attorney-client relationship on which she detrimentally

210. *Id.* at 358.

211. 575 N.E.2d 1001 (Ind. Ct. App. 1991).

212. *Id.* at 1005-06.

213. *Id.* at 1006. The court also noted that the chief public defender could not be vicariously liable when his deputies were not liable. *Id.*

214. In rendering its decision, the court did not rely on any features peculiar to the public defender's office or a public defender's relationship to his or her clients.

215. 570 N.E.2d 951 (Ind. Ct. App.).

216. *Id.* at 953-54.

relied.²¹⁷ As the court's insistence on the seller's proof of an attorney-client relationship shows, the area of legal malpractice relies entirely on the model of relationship. There was no suggestion in the cases of any movement away from that model.

3. *Intentional Interference with Contract or Business Relationship.*—Two reported decisions further elaborated the scope of a person's liability for intentional interference with contract or business relationship. *Eden United, Inc. v. Short*²¹⁸ rejected the defendant's argument that a party to a contract must breach the contract in order to hold a defendant liable for interference; rather, the defendant need only make it difficult or impossible for the contract to be performed.²¹⁹

The most important decision concerning interference with contract was *Bochnowski v. Peoples Federal Savings & Loan Association*.²²⁰ In *Bochnowski*, the plaintiff left the defendant bank's employment in order to work for a real estate office with which the bank had a significant business association. Ultimately, the plaintiff was forced to sever his relationship with this employer, allegedly because of improper pressure placed on the real estate office by the bank.

The plaintiff then sued the bank for intentional interference with his employment contract. The bank contended that, since the plaintiff's contract was at will, it could not be liable for interference. Relying on the great weight of authority in other jurisdictions, the Indiana Supreme Court held that a person could be found liable for interference with an at-will contract.²²¹ Its reasoning sounded in the language of relationship: "[t]he parties in an employment relationship have no less of an interest in the integrity and security of their contract than do parties in any other type of contractual relationship."²²² Therefore, although the "legitimate business purposes" which might excuse an interference with contract might be grounded in notions of public policy,²²³ the prima facie tort is grounded in the model of relationship.

217. *Id.* at 955-57. The court also found that there was no constructive fraud in the case, a holding which has since been superseded by *Sander*.

218. 573 N.E.2d 920 (Ind. Ct. App. 1991).

219. *Id.* at 925.

220. 571 N.E.2d 282 (Ind. 1991). For a further discussion of the labor law implications of *Bochnowski*, see Barbara J. Fick, *Labor and Employment Law*, 25 IND. L. REV. 1311, 1314-15 (1992).

221. *Bochnowski*, 571 N.E.2d at 284.

222. *Id.*

223. For a description of some legitimate business purposes which justify contractual interference, see RESTATEMENT (SECOND) OF TORTS § 767 (1965); KEETON, *supra* note 41, § 129, at 982-89.

4. *Retaliatory Discharge*.—In *Stivers v. Stevens*²²⁴ the court of appeals extended the protection of employees from retaliatory discharge. Previously, in *Frampton v. Central Indiana Gas Co.*,²²⁵ the supreme court had held that employers who fire at-will employees because they file workers' compensation claims can be sued for the tort of retaliatory discharge.²²⁶ In *Stivers*, an at-will employee threatened to file, but never actually filed, a workers' compensation claim prior to being let go. The court of appeals upheld a jury verdict in the employee's favor, ruling that *Frampton* included discharges of at-will employees who merely intend to file workers' compensation claims.

The result of the case is not surprising, but its reasoning demonstrates an interesting choice of the model of duty. The tort of retaliatory discharge necessarily begins with the model of relationship between employer and employee. In expanding the duty, however, *Stivers* relied instead on a model of public policy rather than the model of relationship. The court reasoned that the failure to protect employees who merely intend to file workers' compensation claims would undermine the important public policy of workers' compensation, and that its rule would better deter efforts to thwart the filing of workers' compensation claims.²²⁷ Therefore, in the midst of the economic harm cases which appeal mostly to the model of relationship, the tort of retaliatory discharge appears at first blush to be grounded in notions of public policy. As the next section shows, however, appearances do not entirely reflect reality.

5. *Spoliation of Evidence*.—In *Murphy v. Target Products*,²²⁸ the plaintiff was injured on the job when he used an allegedly defective power saw. The plaintiff commenced a products liability suit against the manufacturer, but was unable to prove his case because the employer had apparently destroyed the saw before it knew of the pending lawsuit. The plaintiff then turned against the employer, suing under the increasingly fashionable tort of "spoliation of evidence." Recognizing that this tort is really a special application of the tort of interference with prospective economic advantage, the court analyzed the duty issue by using the three duty factors akin to those declared in *Webb v. Jarvis*: the

224. 581 N.E.2d 1253 (Ind. Ct. App. 1991). For a further discussion of the labor law implications and context of the case, see Fick, *supra* note 220, at 1315.

225. 297 N.E.2d 425 (Ind. 1993).

226. *Id.* at 427. *Frampton* was limited in 1990 by *Smith v. Electrical Systems Division of Bristol Corp.*, 557 N.E.2d 711 (Ind. Ct. App. 1990), which held that an employee could be fired pursuant to a neutral absence control policy even though the reason for the employee's absence was an accident for which the employee had claimed workers' compensation benefits.

227. *Stivers*, 581 N.E.2d at 1254.

228. 580 N.E.2d 687 (Ind. Ct. App. 1991).

nature of the relationship, a party's knowledge, and the circumstances surrounding the relationship.²²⁹

Like *Webb*, however, the court's holding was ultimately based on the model of relationship. The court's precise holding was that, in the absence of a special relationship arising from contract, statute, or independent tort by the employer, an employer has no duty to preserve evidence for use in a future suit.²³⁰ Although the end of the opinion bolstered the holding with two policy arguments—a desire not to encourage continuous litigation and the plaintiff's ability to preserve evidence by means of subpoena²³¹—the question of relationship was central to the court's reasoning. The court reads this relationship narrowly: when the employer does not harm the employee in a manner directly related to the work which forms the basis of the relationship, then there is no relationship and consequently, no duty.

This line between harms directly related to the work relationship and harms indirectly related to the relationship is the only way to reconcile *Stivers* with *Murphy*. In all other respects, the two cases are identical: conduct by the employer which harms an employee's prospective economic advantage arising from a workplace injury. Yet *Stivers* is extremely solicitous of the policy arguments which protect employees' rights to file workers' compensation claims, while *Murphy* never mentions the negative effect that its decision will have on an employee's ability to file a products liability claim. It seems that *Stivers*, as well as the tort of retaliatory discharge, relies far more on the model of relationship than its language is willing to acknowledge.

6. *The Insurer's Duty of Good Faith*.—The principles of relationship also lie at the heart of the last of the frequently litigated economic torts: the insurer's duty of good faith and fair dealing. The court in *Egnatz v. Medical Protective Co.*²³² was unwilling to find a relationship still in existence when a doctor sued his insurer of thirty-nine years for its failure to renew his insurance. The court refused to accept the theory that the duty of good faith and fair dealing includes a duty not to deny renewal arbitrarily.²³³ On the other hand, *Liberty Mutual Insurance Co. v. Blakesley*²³⁴ held that an insurance company which knew of a mort-

229. *Id.* at 688. Curiously, *Murphy* cited an appellate decision from 1983 to support its use of these three factors; it never cited *Webb*, whose third factor of public policy varies from the third factor used in *Murphy*. *Murphy* constitutes plain evidence that Indiana courts are not accepting the seemingly binding command of *Webb* to use its three factors to determine issues of duty.

230. *Murphy*, 580 N.E.2d at 690.

231. *Id.*

232. 581 N.E.2d 438 (Ind. Ct. App. 1991).

233. *Id.* at 439-40.

234. 568 N.E.2d 1052 (Ind. Ct. App. 1991).

gagee's retained interest in property sold by the mortgagee had a duty to communicate to the mortgagee that the mortgagor was unable to obtain insurance.²³⁵

Likewise, in a case in which there was strong evidence of plaintiff reliance, one court found that an insurance company had a duty to advise a plaintiff injured by an insured of the scope of the release.²³⁶ But in another case in which the insured was represented by counsel and was engaged in coverage litigation with its insurer, the court found that no duty to advise of matters material to the extent of coverage existed.²³⁷ The only way to explain these two cases, in which an insured received less protection than persons whose relationship with the insurer is more attenuated, is to appeal to the concept of reliance which is so central to the establishment of an actionable relationship.

D. The Plaintiff's Obligation of Care

Until now, this Article has focused on the models used by the courts to decide whether to impose a duty of care on a defendant. However, the defendant is not the only person under a duty to avoid injury; the plaintiff has a similar duty. Encapsulated in the terms "comparative fault" and "incurred risk," this obligation requires plaintiffs to exercise due care for their own safety and to accept the consequences of their voluntary assumption of subjectively known and appreciated risks.²³⁸ Unlike the various models which explain the disparate duties of defendants, however, the duty of the plaintiff involves a single model: the model of due care. The plaintiff's obligation of care does not depend on the relationship between the parties or on concerns for public policy or community values. Rather, it rests on the obligation of a plaintiff to use care to avoid foreseeable harm.

For the most part, the cases raising plaintiff conduct defenses accepted this model; therefore, although they added to the practical un-

235. The jury verdict for the plaintiff was overturned on other grounds related to the breadth of instructions given to the jury. *Id.* at 1058.

236. *McDaniel v. Shepherd*, 577 N.E.2d 239 (Ind. Ct. App. 1991). The case proceeded on a constructive fraud theory when the insurance company told the plaintiff that she did not need a lawyer and that the insurance company would assist her with any legal problems. For another instance of an insurance company allegedly misrepresenting the terms of a release to a person injured by the company's insured, see *Fultz v. Cox*, 574 N.E.2d 956 (Ind. Ct. App. 1991).

237. *Wedzeb Enters. v. Aetna Life & Casualty Co.*, 570 N.E.2d 60 (Ind. Ct. App. 1991).

238. See IND. CODE §§ 34-4-33-1 to -13 (1988 & Supp. 1991) (recognizing doctrine of contributory fault); *Get-N-Go v. Markins*, 544 N.E.2d 484 (Ind. 1989) (discussing doctrine of incurred risk); *Beckett v. Clinton Prairie Sch. Corp.*, 504 N.E.2d 552 (Ind. 1987).

derstanding of the scope of these defenses, these cases developed no significant theoretical issues.²³⁹ Three sets of cases, however, suggested some limitations on the model of due care. The first set of cases involved instances in which the courts held that the plaintiffs had no duty to exercise due care on their behalf. In *Valinet v. Eskew*,²⁴⁰ the defendant claimed that the plaintiff, who drove past the tree every day for several years, was contributorily negligent. The Indiana Supreme Court held as a matter of law that a plaintiff has no duty to inspect the trees along her route, and cannot be found contributorily negligent unless she has notice of a tree and appreciates its danger.²⁴¹ Likewise, in *Handrow v. Cox*,²⁴² the Indiana Supreme Court held that a passenger has no duty to look out for other cars.²⁴³

These cases are hard to reconcile with a pure model of due care; indeed, the result in *Valinet* is especially ironic, as well as internally

239. The most interesting of these "routine" plaintiff conduct cases was *Foster v. Purdue Univ. Chapter, The Beta Mu of Beta Theta Pi*, 567 N.E.2d 865 (Ind. Ct. App. 1991), in which the court held that a drunken freshman who fell off a makeshift water slide intended his injuries because of the substantial certainty that injuries would result from his actions; thus, his claim was barred by the "intentional acts" exception to the Comparative Fault Act, IND. CODE § 34-4-33-2(a) (1988). If generally accepted, the court's generous reading of "substantial certainty" could signal trouble for plaintiffs in a host of self-inflicted injury cases.

For sometimes contradictory results in cases involving claims of contributory negligence, comparative negligence, and incurred risk, see *Brownell v. Figel*, 950 F.2d 1285 (7th Cir. 1991) (holding that plaintiff's negligence in operating vehicle while intoxicated and in resisting arrest barred claim that police failed to communicate severity of accident to emergency room doctors); *McGill v. Duckworth*, 944 F.2d 344 (7th Cir. 1991) (finding that prisoner incurred risk of rape when he knew of other prisoners' sexual interest, knew other prisoners were following him, and chose to proceed to shower room rather than avoiding other prisoners); *Smith v. Norfolk & Western Ry. Co.*, 776 F. Supp. 1335 (N.D. Ind. 1991); *Forbes v. Walgreen*, 566 N.E.2d 90 (Ind. Ct. App. 1991) (holding that patient's continued use of wrong prescription even after patient should have realized mistake was governed by comparative fault principles); *Forrest v. Gilley*, 570 N.E.2d 934 (Ind. Ct. App. 1991) (holding that intoxicated plaintiff incurred risk of falling from horse); *Hacker v. Holland*, 570 N.E.2d 951 (Ind. Ct. App. 1991) (recognizing existence of contributory negligence and incurred risk defenses in attorney malpractice action); *Hamilton v. Roger Sherman Architects Group, Inc.*, 565 N.E.2d 1136, 1138 n.3 (Ind. Ct. App. 1991); *Kreigh v. Schick*, 575 N.E.2d 1063 (Ind. Ct. App. 1991); *Lilge v. Russell's Trailer Repair, Inc.*, 565 N.E.2d 1147 (Ind. Ct. App. 1991); *Mead v. Salter*, 566 N.E.2d 577 (Ind. Ct. App. 1991); *Roddel v. Town of Flora*, 580 N.E.2d 255 (Ind. Ct. App. 1991) (holding that plaintiff's failure to stop when police officers flagged him down was negligence per se which barred his claim for personal injuries); *State v. Snyder*, 570 N.E.2d 947 (Ind. Ct. App. 1991); *Whitten v. Kentucky Fried Chicken Corp.*, 570 N.E.2d 1353 (Ind. Ct. App. 1991).

240. 574 N.E.2d 283 (Ind. 1991).

241. *Id.* at 287.

242. 575 N.E.2d 611 (Ind. 1991).

243. *Id.* at 614.

inconsistent, because the court had appealed to the model of due care in defining the defendant's duty. In both cases, it appears that the court believed that the plaintiffs' lack of control over the accident-causing instrumentality (whether the tree or the car in which the plaintiff was riding) absolved them of any responsibility for their own safety. If broadly interpreted, this model of relationship and control suggests a very different basis for a plaintiff's liability for her own conduct, as well as a new language to which plaintiffs seeking to avoid liability for their conduct can appeal.

The second set of cases involved the viability of the sudden emergency doctrine. In *Compton v. Pletch*,²⁴⁴ the Indiana Supreme Court held that the sudden emergency doctrine survived the passage of the Comparative Fault Act, so that a defendant's failure to use reasonable care in the face of an emergency of the plaintiff's making could bar the plaintiff's case.²⁴⁵ Here, of course, there is no direct inconsistency with the model of plaintiff's due care, but the holding highlights, as does *Valinet*, that the issue of duty is not resolved consistently even for both parties in a single case.

A third pair of cases reveals an inconsistency of another type. In *Foster v. Purdue University Chapter, The Beta Mu of Theta Beta Pi*²⁴⁶ the court of appeals held that a drunken fraternity member could not sue the fraternity for the negligent supply of alcohol to minors like himself.²⁴⁷ Rejecting the plaintiff's argument that he did not significantly participate in the decision to throw a party at which alcohol would be served, the court appealed to the rule that members of unincorporated associations cannot sue the association for injuries which result from the association's decisions to engage in certain conduct.²⁴⁸ On the other hand, in *Robbins v. McCarthy*,²⁴⁹ a passenger and a driver, who had been drinking heavily together, were subsequently involved in an accident. As a defense to the passenger's suit against the driver, the driver interposed a defense of "complicity" based on the passenger's drinking and his purchase of drinks for the driver. According to the defendant, this defense was not subject to the Comparative Fault Act and would

244. 580 N.E.2d 664 (Ind. 1991).

245. In *Frito-Lay v. Cloud*, 569 N.E.2d 983 (Ind. Ct. App. 1991), the court of appeals also found that the sudden emergency doctrine had survived the passage of the Comparative Fault Act. Cf. *Brownell v. Figel*, 950 F.2d 1285 (7th Cir. 1991) (finding that the last clear chance doctrine also survived passage of the Act, but finding the doctrine inapplicable on the facts of the case).

246. 567 N.E.2d 865 (Ind. Ct. App. 1991).

247. *Id.* at 872.

248. *Id.* at 870.

249. 581 N.E.2d 929 (Ind. Ct. App. 1991).

absolutely bar a claim by a person with some complicity in the defendant's wrongful conduct. Noting that complicity developed from the dram shop cases and thus, was not a creature of the common law, the court refused to extend the doctrine beyond its present bounds. Unless complicity rises to the level of contributory negligence or incurred risk, the court said, it does not reduce or bar a plaintiff's claim for damages.²⁵⁰

The inconsistency of result in *Foster* and *Robbins* is obvious. Both involved the negligent supply of alcohol, and both involved a plaintiff with some measure of complicity in the defendant's conduct. Yet the minimal complicity of the plaintiff in *Foster* was sufficient to bar his claim, while the overt complicity of the plaintiff in *Robbins* was insufficient. The only way to explain the different results is the model of duty on which each case was based. *Foster* based its view of the defendant's duty on a model of relationship and control.²⁵¹ Carrying this model over to the plaintiff's conduct, it found that the relationship of fraternity member to fraternity absolved the fraternity of responsibility for its actions toward a member. *Robbins*, however, proceeded on the notion that a driver owes a duty to avoid foreseeable injury. That same model of due care was used to measure the plaintiff's conduct, so that the court was unwilling to change to a relationship-based model of complicity to define the plaintiff's duty.

Unlike *Valinet* and *Compton*, *Foster* and *Robbins* are internally consistent in their use of a single model to impose duty on both plaintiffs and defendants. Yet, their initial choice of different models for duty analysis (relationship in *Foster* and due care in *Robbins*) dooms the factually similar conduct of plaintiffs to disparate outcomes.

IV. THE DIRECTION OF DUTY IN INDIANA

In this Article I traced the four approaches—relationship, due care, public policy, and community values—which Indiana courts have used in deciding questions of duty and personal responsibility. Because my study has been empirical rather than normative, I have not attempted to suggest which approach (or combination of approaches) is best.²⁵² My more modest goals have been to point out the muddle of present duty analysis in Indiana and to demonstrate that any consistent theory will require revamping of significant portions of the law of duty. It is easy to declare, as *Webb v. Jarvis* does, a new test for duty. It is

250. *Id.* at 931.

251. *See supra* notes 122-24 and accompanying text.

252. To explain my own normative vision of tort law, which answers the duty question through a combination of community value and utilitarian considerations, is an enterprise far removed from the purpose and scope of this Article.

difficult to apply that analysis to existing duty rules, many of which cannot be justified under *Webb's* analysis. If Indiana's law of duty is ever to lose its arbitrary and contradictory flavor, however, the courts must have the courage to test even the most traditional rules of obligation and responsibility in the crucible of consistent analysis.

Indiana courts will ultimately need to decide whether they will impose a consistent analysis for determining the parties' duties within the broader context of the direction of tort law. It is impossible to answer the question "What should be the test of duty?" without some sense of the nature, the history, and the aspirations of the tort system,²⁵³ as well as the costs and benefits of its alternatives.²⁵⁴ *Webb v. Jarvis*, which declared a comprehensive new test for duty, failed to provide that sense. It is hardly surprising, therefore, that this "test" was ignored—even by the Indiana Supreme Court itself—before the year was out.

253. For various perspectives on these matters, see AMERICAN LAW INSTITUTE, 1 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, 29-33 (1991) [hereinafter ENTERPRISE RESPONSIBILITY]; GUIDO CALABRESI, THE COST OF ACCIDENTS (1970); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW §§ 6.1 to -16 (3d ed. 1986); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 416 (1985); Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981); Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. L. REV. 485 (1989).

254. See, e.g., ENTERPRISE RESPONSIBILITY, *supra* note 253, at 33-50; STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW (1989).

An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 1991*

KEVIN W. BETZ**

This Article examines statistically the Indiana Supreme Court docket, dispositions, and voting in 1991. It is designed to create a greater understanding of the most powerful judicial body in our state. This public body, comprised of only five men,¹ began building the legal foundation of this state in 1817, one year after statehood. Little known to most modern practitioners is that it was a highly progressive and respected institution.² Today's Indiana Supreme Court has returned to that tradition of progress and excellence.³ Because of its sheer power

* The tables presented in this Article are patterned after the annual statistics of the United States Supreme Court published in the *Harvard Law Review*. An explanation of the origin of these tables can be found at *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 301 (1968). The *Harvard Law Review* granted permission for the use of these tables by the *Indiana Law Review* this year; however, permission for any further reproduction of these tables must be obtained from the *Harvard Law Review*.

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1. The Indiana Supreme Court has never had anything other than white, Christian males as members. The Indiana Constitution provides that the court could be comprised of nine members if the General Assembly so decides. See IND. CONST. art. 7, § 2.

2. See generally Randall T. Shepard, *Changing the Constitutional Jurisdiction of the Indiana Supreme Court: Letting a Court of Last Resort Act Like One*, 63 IND. L.J. 669 (1988) [hereinafter Shepard, *Changing the Jurisdiction*].

3. Randall T. Shepard, *Foreword: Indiana Law, The Supreme Court, and a New Decade*, 24 IND. L. REV. 499 (1991). See also Randall T. Shepard, *The New Indiana Supreme Court*, 35 RES GESTAE 341 (1992).

alone, though, it deserves close inspection, especially since the court in 1991 became free again to act as a court of last resort for criminal *and* civil disputes in this state.⁴ Not only does the court decide life and death for criminals, among other issues, it decides how citizens of this state contract with each other, divorce each other, collect money from each other, and decide about death.⁵

In 1991, the supreme court disposed of 1,015 matters. More than 650 of those dispositions were petitions for transfer to the supreme court that were denied without opinion.⁶ On 212 occasions — 134 criminal cases and 78 civil cases — the court handed down a full opinion interpreting the law.⁷ As we know, to interpret the law is many times to make the law,⁸ and the interpretation that becomes law is sometimes only a matter of receiving three votes.⁹

Finally, a significant factor that these tables do not examine is quality. Quantity, obviously, should never be mistaken for the quality of opinions issued. These tables also fail to track the complexity and length of opinions issued by each justice.

The following is a brief description of the highlights from each table.

TABLE A. The most interesting aspect of this table shows first-year Justice Krahulik is already an extremely productive member of the court, and as is seen by other tables, he has also already made a solid impact on the court. The former civil practitioner authored the second-most criminal (36) and second-most civil opinions (19) among the justices. Justice Givan was just barely the most productive opinion writer with 58 total, 55 being criminal opinions. Of those 55 criminal opinions, 54 opinions affirmed the conviction.

Although Justice Givan was the most productive drafter of criminal opinions, Chief Justice Shepard was the most productive author of civil

4. See Shepard, *Changing the Jurisdiction*, *supra* note 2, at 501. See also Randall T. Shepard, State of the Judiciary (Jan. 15, 1992) ("When I first spoke to you four years ago, the backlog at the Indiana Supreme Court stood at an all-time high. I asked you and the people of Indiana to give us the tools to attack the problems. I promised you that we would eliminate the backlog of cases, which was two years long. Today, I am finally able to report victory. Despite a growing caseload now at record levels, we have whipped the backlog at the Indiana Supreme Court!").

5. See Table F.

6. See Supreme Court of Indiana Progress Report — 1991 Case Inventories and Disposition Summary (1992) (available at the office of the Supreme Court Administrator).

7. See Table A.

8. See, e.g., *Covalt v. Carey Canada, Inc.*, 543 N.E.2d 382 (Ind. 1989).

9. See Table D. It is also worth noting how often the Supreme Court personally listens to practitioners discuss cases before them in oral argument. During the past five years, beginning in 1987, the Court had 20 oral arguments; in 1988, 23; in 1989, 22; in 1990, 40; and in 1991, 31, according to the office of the Supreme Court Administrator.

cases with 20.¹⁰ Of all actions disposed of by the justices, Justice Krahulik was the most productive with 155, according to the *Supreme Court of Indiana Progress Report*. That Report tracks all actions disposed of, which includes rehearing opinions,¹¹ concurring or dissenting opinions, and disposing of Petitions for Transfer in civil and criminal cases that are denied without opinion. Table A only tracks full opinions that are handed down in civil, criminal, and original actions, and attorney or judicial disciplinary cases.

Table A also displays that Justice DeBruler, the most senior justice, had by far the most concurrences with 16, with 15 of those in criminal matters. He was second in number of dissents to Justice Givan; Justice DeBruler had 28 and Justice Givan had 33. The other three justices each had 11 dissents. The justices individually dissented 94 times, but this does not mean that 94 opinions carried a dissent because many times more than one justice dissented to the same opinion.

TABLE B-1. The voting alignment of the justices in civil cases shows that no two justices agree more than 76.9% of the time. Chief Justice Shepard and Justice Dickson are the most frequently aligned with each other in civil cases at 76.9%. Justices Shepard and Krahulik are close behind at 76.3% as well as Justices Dickson and Krahulik at 76.3%. On the other hand, Justices DeBruler and Givan only voted together 58.4% of the time in civil cases.

TABLE B-2. For criminal cases, Justices Shepard and Givan are the most frequently aligned with each other at 86.4%. Chief Justice Shepard is also closely aligned with Justices Dickson (82.8%) and Krahulik (82.0%). Justices Givan and DeBruler are again at separate ends of many criminal cases, with a voting alignment of 56.8%.

TABLE B-3. Overall, Justices Shepard, Dickson, and Krahulik form the majority of the court on 80% of the opinions, while Justices DeBruler and Givan are the least aligned two justices to each other (57.4%). Justices DeBruler and Givan are also the least aligned with all of the other members of the court. Chief Justice Shepard is the most frequently aligned with the other members of the court.

TABLE C. More than 60% of the opinions rendered by the court are unanimous or unanimous with concurrence. The court is more agreeable as a court on criminal cases than civil, reflecting the fact that many criminal cases are not complex legal cases, but reach the court simply because the sentence is greater than 50 years.

10. Most agree that being Chief Justice adds at least one-third more duties to the job of a justice on the supreme court.

11. According to the Report, eight rehearing opinions were issued and 43 petitions for rehearing were denied without opinion. On one petition the court changed its original outcome. See *O’Laughlin v. Barton*, 571 N.E.2d 1258 (Ind. 1991).

TABLE D. Of the 212 opinions, 26 were decided by a 3-2 voting margin (12.2%). Interestingly, Justice Dickson was in the three-justice majority more than any other justice. While he was in the three-justice majority on 20 occasions, he authored only four of those opinions. Justice Krahulik was in the majority 18 times, and Chief Justice Shepard was 17 times. Justices DeBruler and Givan were in the 3-2 majority the least number of times at 12 and 11 times respectively, but they wrote the most 3-2 opinions at seven each.

The most common three-justice majority was Justices DeBruler, Dickson, and Krahulik, which combined as the majority for 3-2 opinions on six occasions.

TABLE E. The court's docket is now discretionary in the majority of cases (54%), only 97 of the 212 cases were automatic appeals to the supreme court.¹² Of those 97 direct criminal appeals, the court affirmed 87 (90%). On the other hand, of the 110 cases accepted for transfer, 74 were either reversed or vacated (67%). This statistic is certainly a compelling argument for reform in appellate procedure. For cases that the court accepts on transfer, the court should allow the appellants and appellees to draft another brief focused more on arguments appropriate for a court of last resort.¹³

12. Shepard, *Changing the Jurisdiction*, *supra* note 2, at 521 n.7 (providing the past 10 years of docket information).

13. See George T. Patton, Jr., *Recent Developments in Indiana Appellate Procedure: Reforming the Procedural Path to the Indiana Supreme Court*, 25 IND. L. REV. 1105 (1992).

TABLE A

OPINIONS^a

OPINIONS OF COURT ^b				CONCURRENCES ^c			DISSENTS ^d		
	Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total
Shepard, C.J.	15	20	35	6	1	7	3	8	11
DeBruler ^e	15	10	25	15	1	16	19	9	28
Givan ^e	55	3	58	8	1	9	15	18	33
Dickson	8	11	19	7	2	9	5	6	11
Krahulik ^e	36	19	55	7	1	8	6	5	11
Per Curiam	5	15	20						
Total	134	78	212	43	6	49	48	46	94

^a These are opinions and votes on opinions by each justice and in per curiam in the 1991 term. The Indiana Supreme Court is unique because it is the only one to assign each case to a justice by a consensus method. Cases are distributed by a consensus of the justices in the majority on each case either by volunteering or nominating writers. The Chief Justice does not have any power to control the assignments other than as a member of the majority. See Melinda G. Hall, *Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209 (1990). The order of discussion and voting is started by the most junior member of the court and follows reverse seniority.

^b Plurality opinions that announce the judgment of the court are counted as opinions of the court. This is only a counting of full opinions written by each justice. It includes opinions on civil, criminal, and original actions and disciplinary matters. It does not include rehearing opinions, nor does it include the per curiam opinions given credit to each justice by the Supreme Court of Indiana Progress Report. The per curiam opinions are released publicly with no justice named as the author, but the Report gives credit to the justice who actually wrote the opinion. For the purposes of this Table, per curiam opinions are counted as such, and no credit is given to an individual justice because the public has no method of knowing which justice wrote the opinion. Of the 20 per curiam opinions in 1991, 18 were credited to a justice and two did not give credit to any justice by the Report. According to the Report, which tallies all actions on cases by a justice, the following occurred: Shepard (120), DeBruler (112), Givan (142), Dickson (109), and Krahulik (155). According to the Report, "all actions on cases" includes, among other things, rehearing opinions, concurring or dissenting opinions, and disposition of petitions to transfer without opinion.

^c This includes both written concurrences and votes to concur in result only.

^d This includes both written dissents and votes to dissent without opinion. Opinions concurring in part and dissenting in part or opinions concurring in part only and differing on another issue are counted as dissents.

^e Justice DeBruler did not participate in two opinions. Justice Givan did not participate in one opinion. Justice Krahulik did not participate in two opinions.

TABLE B-1
VOTING ALIGNMENTS FOR CIVIL CASES^f

		Krahulik	Dickson	Givan	DeBruler	Shepard
Shepard	O	58	59	49	55	---
	S	0	1	2	1	---
	D	58	60	51	56	---
	N	76	78	78	77	---
	P	76.3%	76.9%	65.3%	72.7%	---
DeBruler	O	55	55	43	---	55
	S	2	0	2	---	1
	D	57	55	45	---	56
	N	75	77	77	---	77
	P	76.0%	71.4%	58.4%	---	72.7%
Givan	O	45	48	---	43	48
	S	1	0	---	2	2
	D	46	48	---	45	50
	N	76	78	---	77	77
	P	60.5%	61.5%	---	58.4%	64.9%
Dickson	O	58	---	48	55	59
	S	0	---	0	0	1
	D	58	---	48	55	60
	N	76	---	78	77	78
	P	76.3%	---	61.5%	71.4%	76.9%
Krahulik	O	---	58	45	55	58
	S	---	0	1	2	0
	D	---	58	46	57	58
	N	---	76	76	75	76
	P	---	76.3%	60.5%	76.0%	76.3%

^f This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only civil cases. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

- "O" represents the number of times that the two justices agreed in opinions of the court or opinions announcing the judgment of the court.
- "S" represents the number of times the two justices agreed in separate opinions, including agreements in both concurrences and dissents.
- "D" represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.
- "N" represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.
- "P" represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing "D" by "N."

TABLE B-2
VOTING ALIGNMENTS FOR CRIMINAL CASES⁸

		Krahulik	Dickson	Givan	DeBruler	Shepard
Shepard	O	110	111	113	91	---
	S	0	0	2	1	---
	D	110	111	115	92	---
	N	134	134	133	133	---
	P	82.0%	82.8%	86.4%	69.1%	---
DeBruler	O	90	92	74	---	91
	S	3	4	0	---	1
	D	93	96	74	---	92
	N	133	133	132	---	133
	P	69.9%	72.1%	56.8%	---	69.1%
Givan	O	97	94	---	75	113
	S	4	0	---	0	2
	D	101	94	---	75	115
	N	133	133	---	132	133
	P	75.9%	70.6%	---	56.8%	86.4%
Dickson	O	107	---	94	92	111
	S	2	---	0	4	0
	D	109	---	94	96	111
	N	134	---	133	133	134
	P	81.3%	---	70.6%	72.1%	82.8%
Krahulik	O	---	107	97	90	110
	S	---	2	4	3	0
	D	---	109	101	93	110
	N	---	134	133	133	134
	P	---	81.3%	75.9%	69.9%	82.0%

⁸ This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only criminal cases. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

"O" represents the number of times that the two justices agreed in opinions of the court or opinions announcing the judgment of the court.
"S" represents the number of times the two justices agreed in separate opinions, including agreements in both concurrences and dissents.
"D" represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.
"N" represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.
"P" represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing "D" by "N."

TABLE B-3
VOTING ALIGNMENTS FOR ALL CASES^h

		Krahulik	Dickson	Givan	DeBruler	Shepard
Shepard	O	168	170	162	146	---
	S	0	1	4	2	---
	D	168	171	166	148	---
	N	210	212	211	210	---
	P	80.0%	80.6%	78.6%	70.4%	---
DeBruler	O	145	147	118	---	146
	S	5	4	2	---	2
	D	150	151	120	---	148
	N	208	210	209	---	210
	P	72.1%	71.9%	57.4%	---	70.4%
Givan	O	142	142	---	118	162
	S	5	0	---	2	4
	D	147	142	---	120	166
	N	209	211	---	209	210
	P	70.3%	67.2%	---	57.4%	78.6%
Dickson	O	165	---	142	147	170
	S	2	---	0	4	1
	D	167	---	142	151	171
	N	210	---	211	210	212
	P	79.5%	---	67.2%	71.9%	80.6%
Krahulik	O	---	165	142	145	168
	S	---	2	5	5	0
	D	---	167	147	150	168
	N	---	210	209	208	210
	P	---	79.5%	70.3%	72.1%	80.0%

^h This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for all cases. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

"O" represents the number of times that the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

"S" represents the number of times the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

"D" represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

"N" represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

"P" represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing "D" by "N."

TABLE C
UNANIMITYⁱ

Unanimous ^j			Unanimous With Concurrence ^k			Opinions With Dissent			Total
Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total	
68	36	104 (49.1%)	28	3	31 (14.6%)	38	39	77 (36.3%)	212

ⁱ This Table tracks the number and percent of unanimous opinions among all opinions written. If, for example, only four justices participate and concur, it is still considered unanimous. It also tracks the percent of opinions with concurrence and opinions with dissent.

^j A decision is considered unanimous only when all justices participating in the case voted to concur in the court's opinion as well as its judgment. When one or more justices concurred in the result but not in the opinion, the case is not considered unanimous.

^k A decision is listed in this column if one or more justices concurred in the result but not in the opinion of the court or wrote a concurrence, and there were no dissents.

TABLE D

3-2 DECISIONS¹

Justices Constituting the Majority	Number of Opinions ^m
1. Shepard, DeBruler, Dickson	4
2. Shepard, DeBruler, Krahulik	1
3. Shepard, Givan, Dickson	4
4. Shepard, Givan, Krahulik	4*
5. Shepard, Dickson, Krahulik	4
6. DeBruler, Givan, Krahulik	1
7. DeBruler, Dickson, Krahulik	6
8. Givan, Dickson, Krahulik	2
Total ⁿ	26

¹ This Table concerns only decisions rendered by full opinion. An opinion is counted as a 3-2 decision if two justices voted to decide the case in a manner different from that of the majority of the court. The order of the justices' names is based on the tradition of the court, which is placing the Chief Justice first and then following the seniority of the justices.

^m This column lists the number of times each three-justice group constituted the majority in a 3-2 decision.

ⁿ The 1991 term's 3-2 decisions were:

1. **Shepard, DeBruler, Dickson:** *Thomas v. Thomas*, 577 N.E.2d 216 (Ind. 1991) [Dickson]; *Brady v. State*, 575 N.E.2d 981 (Ind. 1991) [DeBruler]; *Beatty v. State*, 567 N.E.2d 1134 (Ind. 1991) [Dickson]; *Best v. State*, 566 N.E.2d 1027 (Ind. 1991) [per curiam].

2. **Shepard, DeBruler, Krahulik:** *In re D.S.*, 577 N.E.2d 572 (Ind. 1991) [Krahulik].

3. **Shepard, Givan, Dickson:** *Taylor v. State*, 578 N.E.2d 664 (Ind. 1991) [Givan]; *Holderfield v. State*, 578 N.E.2d 661 (Ind. 1991) [Givan]; *Rogers v. State*, 570 N.E.2d 906 (Ind. 1991) [Givan]; *Dishman v. Hill*, 578 N.E.2d 654 (Ind. 1991) [Shepard].

4. **Shepard, Givan, Krahulik:** *Kuchel v. State*, 570 N.E.2d 910 (Ind. 1991) [Givan]; *Tapia v. State*, 569 N.E.2d 655 (Ind. 1991) [Givan]; *Concepcion v. State*, 567 N.E.2d 784 (Ind. 1991) [Givan]; *In re Smith*, 579 N.E.2d 450 (Ind. 1991) [per curiam]; **O'Laughlin v. Barton*, 571 N.E.2d 1258 [Givan], *reh'g granted*, 582 N.E.2d 817 (Ind. 1991) (Krahulik joined DeBruiler and Dickson in the new majority on rehearing).

5. **Shepard, Dickson, Krahulik:** *Natural Resources Comm'n of Ind. Dep't of Nat. Resources v. Porter Co. Drainage Bd.*, 576 N.E.2d 587 (Ind. 1991) [Shepard]; *General Motors Corp. v. Aetna Casualty & Surety Co.*, 573 N.E.2d 885 (Ind. 1991) [Dickson]; *Kennedy v. State*, 578 N.E.2d 633 (Ind. 1991) [Krahulik]; *State ex rel. London v. Lake Superior Ct.*, 569 N.E.2d 635 (Ind. 1991) [per curiam].

6. **DeBruler, Givan, Krahulik:** *State, ex. rel. Hahn v. Howard Circuit Ct.*, 571 N.E.2d 540 (Ind. 1991) [DeBruler].

7. **DeBruler, Dickson, Krahulik:** *Citizens Action Coalition of Ind., Inc. v. Public Serv. Co. of Ind., Inc.*, 582 N.E.2d 330 (Ind. 1991) [DeBruler]; *Bochnowski v. Peoples Fed. Savings & Loan Ass'n*, 571 N.E.2d 282 (Ind. 1991) [DeBruler]; *Waters v. State*, 574 N.E.2d 911 (Ind. 1991) [Krahulik]; *Evans v. State*, 571 N.E.2d 1231 (Ind. 1991) [DeBruler]; *Lynch v. State*, 571 N.E.2d 537 (Ind. 1991) [Krahulik]; *O'Laughlin v. Barton*, 571 N.E.2d 1258, (Ind. 1991) [DeBruler].

8. **Givan, Dickson, Krahulik:** *Hale v. Kemp*, 579 N.E.2d 63 (Ind. 1991) [Dickson]; *State ex rel. Gosnell v. Cass Circuit Ct.*, 577 N.E.2d 957 (Ind. 1991) [Givan].

TABLE E
DISPOSITION OF CASES REVIEWED BY TRANSFER
AND DIRECT APPEALS^o

	Reversed	Vacated ^P	Affirmed	Total
Civil Opinions Accepted for Transfer	11 (18%)	33 (55%)	16 (27%)	60
Direct Civil Appeals	1 (8%)	0 (0%)	11 (92%)	12
Criminal Opinions Accepted for Transfer	12 (31%)	17 (45%)	9 (24%)	38
Direct Criminal Appeals	8 (8%)	2 (2%)	87 (90%)	97
Total	32 (16%)	52 (25%)	123 (59%)	207 ^q

^o Direct criminal appeals are cases in which the trial court imposed a sentence of greater than 50 years. See IND. CONST. art. 7, § 4. Thus, direct criminal appeals are those directly from the trial court. A civil appeal may also be direct when either the supreme court has original jurisdiction, such as attorney or judicial discipline cases, or upon a showing of an emergency and that the appeal involves a substantial question of law of great public importance. See IND. APP. R. 4(A). All other Indiana Supreme Court opinions are accepted for transfer from the Indiana Court of Appeals. See IND. APP. R. 11(B). The court’s transfer docket, especially civil cases, has substantially increased in the past two years. See Randall T. Shepard, *Indiana Law, the Supreme Court, and a New Decade*, 24 IND. L. REV. 499 (1991).

^P Generally, the term “vacate” is used by the Indiana Supreme Court when it is reviewing a court of appeals opinion, while the term “reverse” is used when the court overrules a trial court decision. A point to consider in reviewing this Table is that the court technically “vacates” every court of appeals opinion that is accepted for transfer, but may only disagree with a small portion of the reasoning and still agree with the result. See IND. APP. R. 15(B)(3).

^q This does not include 5 Writs of Mandamus or Prohibition because the court does not reverse, vacate, or affirm these actions. See IND. R. OF PROC. FOR ORIG. ACTIONS.

TABLE F
SUBJECT AREAS OF SELECTED DISPOSITIONS
WITH FULL OPINIONS^r

	Number
Original Actions	
• Writs of Mandamus or Prohibition	5 ^s
• Attorney Discipline	9 ^t
• Judicial Discipline	1 ^u
Criminal	
• Death Penalty	6 ^v
• Fourth Amendment or Search and Seizure	7 ^w
• Reserved Questions of Law	1 ^x
Emergency Appeals to the Supreme Court	1 ^y
Trusts, Estates or Probate	8 ^z
Real Estate or Real Property	3 ^{aa}
Landlord-Tenant	0
Divorce or Child Support	8 ^{bb}
Children In Need of Services (CHINS)	1 ^{cc}
Paternity	2 ^{dd}
Product Liability or Strict Liability	2 ^{ee}
Negligence or Personal Injury	22 ^{ff}
Indiana Tort Claims Act	4 ^{gg}
Statute of Limitations or Statute of Repose	4 ^{hh}
Tax or Department of State Revenue or State Board of Tax Commissioners	7 ⁱⁱ
Contracts	14 ^{jj}
Corporate Law or the Indiana Business Corporation Law	0 ^{kk}
Uniform Commercial Code	1 ^{ll}
Banking Law	2 ^{mm}
Employment Law	10 ⁿⁿ
First Amendment, Open Door Law or Public Records Law	1 ^{oo}
Indiana Constitution	11 ^{pp}

^r This Table is designed to provide a general idea of the specific subject areas upon which the court ruled or discussed and how many times it did so in 1991. It is also a quick-reference guide to court rulings for practitioners in specific areas of the law. The numbers corresponding to the areas of law reflect the number of cases in which the court substantively discussed legal issues about these subject areas. A citation list is provided in a footnote for each area.

^s According to the Supreme Court, 82 writs were submitted, 59 were denied, 12 were granted, and 7 were cancelled in 1991. The following 5 were assigned for opinion: *State ex rel. Jeryl Gosnell v. Cass Circuit Ct.*, 577 N.E.2d 957 (Ind. 1991); *Indiana ex rel. Prosser v. Lake Circuit Ct.*, 565 N.E.2d 751 (Ind. 1991); *State ex rel. Hahn v. Howard Circuit Ct.*, 571 N.E.2d 540 (Ind. 1991); *State ex rel. Rondon v. Lake Superior Ct.*, 569 N.E.2d 635 (Ind. 1991); *State ex rel. Petry v. Madison County Superior Ct.*, 573 N.E.2d 884 (Ind. 1991).

^t The Supreme Court issues orders in this area, but only writes a full opinion when a public sanction is imposed against an attorney. Opinions are not written when the attorney prevails, the reprimand is private, or the attorney resigns. IND. R. FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS, R. 23. The court disposed of 25 attorney discipline matters by order. *In re Smith*, 579 N.E.2d 450 (Ind. 1991); *In re Coleman*, 569 N.E.2d 631 (Ind. 1991); *In re Olsen*, 581 N.E.2d 1244 (Ind. 1991); *In re Eddingfield*, 572 N.E.2d 1293 (Ind. 1991); *In re Wells*, 572 N.E. 2d 1290 (Ind. 1991); *In re Smith*, 572 N.E.2d 1280 (Ind. 1991); *In re Haynes*, 567 N.E. 2d 95 (Ind. 1991); *In re Gemmer*, 566 N.E. 2d 528 (Ind. 1991).

^u *In re Sallee*, 579 N.E.2d 75 (Ind. 1991).

^v The Indiana Supreme Court reviewed 6 death penalty sentences by the trial court and affirmed 4. *Conner v. State*, 580 N.E.2d 214 (Ind. 1991) (affirmed); *Kennedy v. State*, 578 N.E.2d 633 (Ind. 1991) (reversed); *Benefiel v. State*, 578 N.E.2d 338 (Ind. 1991) (affirmed); *Benirschke v. State*, 577 N.E.2d 576 (Ind. 1991) (affirmed); *Brown v. State*, 577 N.E.2d 221 (Ind. 1991) (affirmed); *Roark v. State*, 573 N.E.2d 881 (Ind. 1991) (reversed).

^w *Caldwell v. State*, 583 N.E.2d 122 (Ind. 1991); *Daniel v. State*, 582 N.E.2d 364 (Ind. 1991); *Hopkins v. State*, 582 N.E.2d 345 (Ind. 1991); *Houchin v. State*, 581 N.E.2d 1228 (Ind. 1991); *Benefiel v. State*, 578 N.E.2d 338 (Ind. 1991); *Snellgrove v. State*, 569 N.E.2d 337 (Ind. 1991); *Smith v. State*, 560 N.E.2d 1059 (Ind. 1991).

^x Pursuant to Indiana Code § 35-38-4-2, the State of Indiana may appeal questions of law in criminal matters as reserved questions. *State v. Romero*, 578 N.E.2d 673 (Ind. 1991).

^y *In re Lawrance*, 579 N.E.2d 32 (Ind. 1991).

^z *State v. Hogan*, 582 N.E.2d 824 (Ind. 1991); *Buckley, Allstate Ins. Co. v. Standard Inv. Co.*, 581 N.E.2d 920 (Ind. 1991); *In re Lawrance*, 579 N.E.2d 32 (Ind. 1991); *Thomas v. Thomas*, 577 N.E.2d 216 (Ind. 1991); *Hammond Lead Prod., Inc. v. State of Indiana Tax Comm'rs*, 575 N.E.2d 998 (Ind. 1991); *Indiana Dep't of State Revenue v. Felix*, 571 N.E.2d 287 (Ind. 1991); *TransAmerica Ins. Serv. v. Kopko*, 570 N.E.2d 1283 (Ind. 1991); *Strutz v. Robinson*, 568 N.E.2d 547 (Ind. 1991).

^{aa} *Clem v. Christole, Inc. and Richards v. Hopewell Ctr., Inc.*, 582 N.E.2d 780 (Ind. 1991); *Valinet v. Eskew*, 574 N.E.2d 283 (Ind. 1991); *In re Gemmer*, 566 N.E.2d 528 (Ind. 1991).

^{bb} *In re Paternity of Humphrey v. Woods*, 583 N.E.2d 133 (Ind. 1991); *Neudecker v. Neudecker*, 577 N.E.2d 960 (Ind. 1991); *Thomas v. Thomas*, 577 N.E.2d 216 (Ind. 1991); *Cowe v. Forum Group, Inc.*, 575 N.E.2d 630 (Ind. 1991); *Vore v. Vore*, 573 N.E.2d 397 (Ind. 1991); *State ex rel. Hahn v. Howard Circuit Ct.*, 571 N.E.2d 540 (Ind. 1991); *In re Marriage of Caplon*, 567 N.E.2d 1130 (Ind. 1991).

^{cc} *In re Tina T.*, 579 N.E.2d 48 (Ind. 1991).

^{dd} *In re Paternity of Humphrey*, 583 N.E.2d 133 (Ind. 1991); *Cowe v. Forum Group, Inc.*, 575 N.E.2d 630 (Ind. 1991).

^{ee} *Allied Resin Corp. v. Waltz*, 574 N.E.2d 913 (Ind. 1991); *General Motors Corp. v. Aetna Casualty Assurity Co.*, 573 N.E.2d 885 (Ind. 1991).

^{ff} *State v. Hogan*, 582 N.E.2d 824 (Ind. 1991); *Havens v. Ritchey*, 582 N.E.2d 782 (Ind. 1991); *Sanders v. Townsend*, 582 N.E.2d 355 (Ind. 1991); *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991); *Winbush v. Memorial Health Sys., Inc.*, 581 N.E.2d 239 (Ind. 1991); *Compton v. Pletch*, 580 N.E.2d 664 (Ind. 1991); *McCarty v. Hospital Corp. of Am.*, 580 N.E.2d 228 (Ind. 1991); *Shuamber v. Henderson*, 579 N.E.2d 452 (Ind. 1991); *Indianapolis Power & Light Co. v. Snodgrass*, 578 N.E.2d 669 (Ind. 1991); *Peak v. Campbell*, 578 N.E.2d 360 (Ind. 1991); *Hale v. Kemp*, 579 N.E.2d 63 (Ind. 1991); *Cowe v. Forum Group, Inc.*, 575 N.E.2d 630 (Ind. 1991); *Handrow v. Cox*, 575 N.E.2d 611 (Ind. 1991); *Webb v. Jarvis*, 575 N.E.2d 992 (Ind. 1991); *Valinet v. Eskew*, 574 N.E.2d 283 (Ind. 1991); *Beresford v. Starkey*, 571 N.E.2d 1257 (Ind. 1991); *TransAmerica Ins. Serv. v. Kopko*, 570 N.E.2d 1283 (Ind. 1991); *Cullison v. Medley*, 570 N.E.2d 27 (Ind. 1991); *Leloup v. Leloup*, 569 N.E.2d 648 (Ind. 1991); *Burrell v. Meads*, 569 N.E.2d 637 (Ind. 1991); *Parks v. Parks*, 569 N.E.2d 644 (Ind. 1991); *Risk v. Schilling*, 569 N.E.2d 646 (Ind. 1991).

^{gg} *Indiana Dep't of Correction v. Hulen*, 582 N.E.2d 380 (Ind. 1991); *City of Wakarusa v. Holdeman*, 582 N.E.2d 802 (Ind. 1991); *Tittle v. Mahan*, 582 N.E.2d 796 (Ind. 1991); *Buckley v. Standard Inv. Co.*, 581 N.E.2d 920 (Ind. 1991).

^{hh} *Haven v. Richey*, 582 N.E.2d 792 (Ind. 1991); *McCarty v. Hospital Corp. of Am.*, 580 N.E.2d 228 (Ind. 1991); *Allied Resin Corp. v. Waltz*, 574 N.E.2d 913 (Ind. 1991); *Hoosier Energy Rural Elec. Coop., Inc. v. Indiana Dep't of State Revenue*, 572 N.E.2d 481 (Ind. 1991).

ⁱⁱ Six appeals were transferred from the Indiana Tax Court, and the Supreme Court affirmed the Tax Court on each appeal. The 6 appeals in 1991 from the tax court to the supreme court are the first 6 citations in this footnote. *Consolidation Coal Co. v. Indiana Dep't of State Revenue*, 583 N.E.2d 1199 (Ind. 1991); *US AIR, Inc. v. Indiana Dep't of State Revenue*, 582 N.E.2d 777 (Ind. 1991); *Indiana Dep't of State Revenue v. Chrome Deposit Corp.*, 578 N.E.2d 643 (Ind. 1991); *Hammond Lead Prod., Inc. v. State of Ind. Tax Comm'rs*, 575 N.E.2d 998 (Ind. 1991); *Hoosier Energy Rural Elec. Coop., Inc. v. Indiana Dep't of State Revenue*, 572 N.E.2d 481 (Ind. 1991); *St. Mary's Medical Ctr. of Evansville, Inc. v. State Bd. of Tax Comm'rs*, 571 N.E.2d 1247 (Ind. 1991); *Indiana Dep't of State Revenue v. Felix*, 571 N.E.2d 287 (Ind. 1991).

^{jj} *Minder v. Martin Luther Home Found.*, 582 N.E.2d 788 (Ind. 1991); *Sanders v. Townsend*, 582 N.E.2d 355 (Ind. 1991); *Picadilly, Inc. v. Raikos*, 582 N.E.2d 228 (Ind. 1991); *McCarty v. Hospital Corp. of Am.*, 580 N.E.2d 228 (Ind. 1991); *Indianapolis Power & Light*

v. Snodgrass, 578 N.E.2d 669 (Ind. 1991); Dishman v. Hill, 578 N.E.2d 654 (Ind. 1991); Hale v. Kemp, 579 N.E.2d 63 (Ind. 1991); Thomas v. Thomas, 577 N.E.2d 16 (Ind. 1991); Webb v. Jarvis, 575 N.E.2d 992 (Ind. 1991); First Nat'l Bank of Logansport v. Logan Mfg. Co., Inc., 577 N.E.2d 949 (Ind. 1991); Bayh v. Sonnenburg, 573 N.E.2d 398 (Ind. 1991); State *ex rel.* Hahn v. Howard Circuit Ct., 571 N.E.2d 540 (Ind. 1991); Bochnowski v. Peoples Fed. Savings & Loan Ass'n, 571 N.E.2d 282 (Ind. 1991); Sturtz v. Robinson, 568 N.E.2d 547 (Ind. 1991).

^{kk} Although many opinions directly involved corporations or affected corporations, the supreme court did not discuss or rule upon directly the area of corporate law or the Indiana Business Corporation Law.

^{ll} General Motors Corp. v. Aetna Casualty Assurity Co., 573 N.E.2d 885 (Ind. 1991).

^{mm} Hammond Lead Prod., Inc. v. State of Indiana Tax Comm'rs, 575 N.E.2d 998 (Ind. 1991); First Nat'l Bank of Logansport v. Logan Mfg. Co., Inc. 577 N.E.2d 949 (Ind. 1991).

ⁿⁿ City of Wakarusa v. Holdenman, 582 N.E.2d 802 (Ind. 1991); Indiana State Prison v. Van Ulzen, 582 N.E.2d 789 (Ind. 1991); Tittle v. Mahan, 582 N.E.2d 796 (Ind. 1991); State v. Romero, 578 N.E.2d 673 (Ind. 1991); Hale v. Kemp, 579 N.E.2d 63 (Ind. 1991); Bayh v. Sonnenburg, 573 N.E.2d 398 (Ind. 1991); Stoner v. Review Bd., 571 N.E.2d 296 (Ind. 1991); Bochnowski v. Peoples Fed. Savings & Loan Ass'n, 571 N.E.2d 282 (Ind. 1991); The Osler Inst., Inc. v. Inglert, 569 N.E.2d 636 (Ind. 1991); Indiana Dep't of Highways v. Pigg, 580 N.E.2d 673 (Ind. 1991).

^{oo} Indianapolis Convention & Visitors Ass'n, Inc. v. Indianapolis Newspapers, Inc., 577 N.E.2d 208 (Ind. 1991).

^{pp} Chanley v. State, 583 N.E.2d 126 (Ind. 1991); Clem v. Christole, Inc., 582 N.E.2d 780 (Ind. 1991); *In re* Tina T., 579 N.E.2d 48 (Ind. 1991); Benefiel v. State, 578 N.E.2d 338 (Ind. 1991); *In re* Lawrance, 579 N.E.2d 32 (Ind. 1991); Jackson v. State, 575 N.E.2d 617 (Ind. 1991); Waters v. State, 574 N.E.2d 911 (Ind. 1991); Brady v. State, 575 N.E.2d 981 (Ind. 1991); Bayh v. Sonnenberg, 573 N.E.2d 398 (Ind. 1991); Indiana Dep't of State Revenue v. Felix, 571 N.E.2d 287 (Ind. 1991); Best v. State, 566 N.E.2d 1027 (Ind. 1991).



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